TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 675

GEORGE MOORE ICE CREAM COMPANY, INC.,
PETITIONER,

vs.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE
FOR THE DISTRICT OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1933

CERTIORARI GRANTED MARCH 20, 1933

(37,372)

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

At Law. No. 1197

GEORGE MOORE ICE CREAM COMPANY, Atlanta, Ga., Plaintiff,

vs.

J. T. ROSE, Collector of Internal Revenue, Defendant

AMENDED PETITION—Filed March 28, 1931

Now comes the plaintiff, by its Attorney, D. J. Gantt, and with leave of the Court, amends the petition heretofore filed, so when amended, it will read as follows:

[fol. 2] 1.

"That at all times herein mentioned plaintiff was and is now a corporation organized and existing under the laws of the State of Georgia, with office and principal place of business in Atlanta, Georgia.

2

"That at the time of the alleged illegal collection of taxes hereinafter complained of, J. T. Rose, was and is now Collector of Internal Revenue for the collection district of Georgia, with office located in Atlanta, Fulton County, Georgia, and residence within said State and county.

3

"That this is a suit of a civil nature at common law, and arises under the Constitution and Laws of the United States providing for Internal Revenue.

4

"That the defendant, the said J. T. Rose, is indebted to plaintiff in the sum of $4,551.01, with interest from date

of payment thereof, at 6% per annum, on account of taxes illegally collected from plaintiff without authority of law, as will hereinafter be shown.

5

"That the plaintiff on April 1, 1918, within the time prescribed by law, duly filed its corporation income tax return for the taxable year ended December 31, 1917, disclosing a loss thereon in the sum of $21,037.25, and no tax liability.

[fol. 3] 6

"That thereafter the Commissioner of Internal Revenue caused an audit to be made of the books of the plaintiff and as a result thereof by his letter of May 24, 1921, determined that the plaintiff had a taxable net income of $16,040.18; that the average invested capital for the year 1917 was $28,416.30, and that the resulting tax liability was $6,871.18. Said letter set forth in detail items of income and invested capital.

7

"Plaintiff further shows that the tax liability so determined was based upon and resulted from certain adjustments made in net income and invested capital of plaintiff, contrary to law and not sustained by the records of the plaintiff or other evidence sustaining the conclusion.

8

"Plaintiff further shows that said amount was duly assessed in November, 1921, and that thereafter the said J. T. Rose, the defendant herein, acting as Collector of Internal Revenue for the Collection District of Georgia, claiming to act under and pursuant to the provisions of the Revenue Act of 1921, demanded of plaintiff the principal sum of $6,874.00, together with legal interest, and notified plaintiff that if payment of tax, penalty and interest was not made within ten days, that collection would be enforced by seizure and sale of plaintiff's property.

9

"That plaintiff herein, solely in order to prevent the imposition of penalties and interest, and the distraint and

[fol. 4] sale of its property, with incident cost and inconvenience, and upon compulsion and duress, paid to the defendant on November 5, 1923, the said sum of $6,874.00.

10

"That thereafter on November 5, 1927, plaintiff filed a claim for refund, in form and manner prescribed by law and regulations with the Collector of Internal Revenue for the District of Georgia, for transmission to the Commissioner of Internal Revenue, copy of which is attached hereto and marked Exhibit "A"; that thereafter on or about November 13, 1928, and January 2nd, 1929, detailed statements showing all of the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim; that the commissioner accepted the claim without objecting to it as insufficient in form and had the same under consideration from November 5, 1927; that the amendments to the claim were filed prior to May 1, 1929, and before the Commissioner had acted on the claim and no objection was made to the sufficiency of the claim until June 20, 1929.

11

"Said claim for refund, together with supplemental data as recited in above paragraph, was referred by the Commissioner of Internal Revenue to the Internal Revenue Agent in Charge, Atlanta, Georgia, and was assigned to Revenue Agent H. E. Smith for verification, and after examination he determined that plaintiff was rightfully entitled to a refund of $4,551.01 based upon a corrected tax liability of $2,322.98. Copy of letter acknowledging such corrected tax liability is attached hereto and marked Exhibit "B."

[fol. 5] 12

"That thereafter on September 18, 1929, the Commissioner of Internal Revenue rejected said claim for refund in full.

13

"Plaintiff further alleges said collection of the sum of $6,874.00 was illegal, void, and without authority of law, for the reason that said tax for the calendar year 1917, was computed upon an incorrect income and invested capital, in that the tax was computed upon a taxable net income of $16,940.18 and an average invested capital for the year 1917 of $28,416.30.

14

"That for the taxable year 1917, the correct taxable net income is $9,546.35; the correct average invested capital is $27,823.40, and the correct tax liability is $2,322.99.

15

"That no part of said sum of $6,874.00 has been refunded or repaid to plaintiff, or credited to any tax payments due by it, and that plaintiff is entitled to recover the sum of $4,551.01, with interest thereon from date of payment at 6% per annum."

Wherefore, petitioner, prays judgment for the principal sum of $4,551.01, with legal interest from date of payment.

Plaintiff, further amends said petition by striking Counts One and Two of said original petition, together with all amendments thereto.

[fol. 6] Wherefore plaintiff prays that this its amendment be allowed.

D. J. Gantt, Attorney for Petitioner, 321 Healey Building, Atlanta, Georgia.

Duly sworn to by Geo. Moore. Jurat omitted in printing.

ORDER ALLOWING AMENDMENT

Read and considered.

It is hereby ordered, that the foregoing amendment be allowed, subject to demurrer, and with privilege of defendant to answer.

It is further ordered that all pleadings heretofore filed in conflict with this amendment, be and the same are hereby

stricken, and that in lieu thereof, this amendment is to be treated for all purposes as an original petition.

This the 28th day of March, 1931.

E. Marvin Underwood, United States District Judge.

[fol. 7] EXHIBIT "B" TO PETITION

Treasury Department, Internal Revenue Service, Atlanta, Ga.

February 21, 1929.

Mr. Wm. M. Leppard, Candler Bldg., Atlanta, Ga.

In re George Moore Ice Cream Co.

DEAR SIR: Find herewith agreement form 866 prepared for the signatures of the officers of the above named corporation. You will note that the corrected tax liability is $2,322.98. Originally or previously assessed $6,873.99, refund due $4,551.01.

The amended net income upon which this tax is computed is $9,546.35, arrived at as explained to you in conference the other day.

Kindly have this document signed by the president, attested by the secretary, the corporate seal affixed, and dated, and return to me in the enclosed envelope at the earliest possible date.

Respectfully, H. E. Smith, Revenue Agent.

EXHIBIT "A" TO PETITION

Treasury Department, Internal Revenue Service

Claim

Revised June, 1930

To be filed with the Collector where assessment was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[fol. 8] X Refund of Tax Illegally Collected

STATE OF GEORGIA,
County of Fulton, ss:

Name of taxpayer or purchaser of stamps: George Moore Ice Cream Company, Inc., (Street) 51 East Alabama Street, (City) Atlanta, (State) Georgia.

The Deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Georgia.

2. Period (if for income tax, make separate form for each taxable year: From Jan. 1, 1917, to Dec. 31, 1917.

3. Character of assessment or tax: Income and Profits Tax.

4. Amount of assessment: $—, dates of payment: (a) Nov. 5, 1923.

6. Amount to be refunded: $6,871.18.

The deponent verily believes that this claim should be allowed for the following reasons:

(a) See Copy of Collector's Letter dated December 6, 1926 attached.

First. The collection of this tax was made after *after* the five year period as provided in Section 250(d) Act of 1921 and was illegal.

[fol. 9] The due date for filing returns for this period was extended until April 1, 1918, and Section 250 (d) of the Act of 1921 which was retroactive provided that the amount of Income and Excess Profits taxes due for this year, 1917, shall be assessed and collected within five years from the date return was filed. Attached and forming part of this claim are additional pages 2 to 5 of letter from Collector of Internal — dated 12-6-1926.

(Signed) George Moore Ice Cream Co., by Tom Noras, Secretary. (Seal of Corporation.)

Sworn to and subscribed before me this 4th day of November, 1927. C. G. Allen, Notary Public, State at Large. (Seal of Office.)

(Blank items not indicated.)

Claim for Refund

In re George Moore Ice Cream Company, 51 East Alabama Street, Atalanta, Georgia

This tax was not collected until seven months and four days after the five year period in which the collector could be legally made.

Section 250(d) of the 1921 Act states:

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921, or succeeding taxable years shall be deter- [fol. 10] mined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

Section 250 (d) of the Act of 1921 above quoted is sustained by Supreme Court decision of the United States in the case of Frank K. Bowers, individually and as Collector vs. New York and Albany Lighterage Company and two other identical cases all of which were decided February 21, 1927.

In this decision it was held:

"1. Collection by distraint of income taxes imposed by the Revenue Acts of 1916 and 1917 is barred by Section 250(d) of the Revenue Act of 1921 five years from the time the return was filed although the taxes were duly assessed within the five year period provided by Section 250(d) of that Act.

"2. Distraint is a 'proceeding' as that term is used in Section 250(d) of the Revenue Act of 1921.

"3. The intention of Congress by Section 250(d) of the Revenue Act of 1921 was to protect taxpayers against any [fol. 11] proceeding whatsoever for the collection of tax claims not made and pressed within five years of the time the return was filed."

This tax was assessed and collected prior to the passage of the Act of 1924 and it is stated in G. C. M. 1546: VI-17-3209 that:

"The six year period of limitation on the collection of a tax after assessment provided in Section 278(d), Acts of 1924 and 1926, does not apply, where the five-year period of limitation of Section 250(d), Act of 1921, or such five-year period as extended by waivers, has expired prior to June 2, 1924, and collection cannot be made in such cases either by distraint or a proceeding in Court. G. C. M. 1546; VI-17-3209."

Second

A percentage used in computing the variable deduction for excess profits should be allowed equal to the same percentage allowed similar corporation engaged in the same line of business.

This corporation is a continuation of the business previously conducted by George Moore as an individual, however, prewar net income and invested capital are not available.

Taxpayer was only allowed 7% variable deduction in the Computation of Excess Profits Tax for the year 1917 and now requests that there be allowed the same deduction that similar corporations engaged in the same line of business were allowed as provided in Article 23 of Regulations No. 41, which states:

"When income for prewar period cannot be satisfactorily determined, or when net income was low during prewar pe- [fol. 12] riod, or where there was no net income during prewar period—in the following cases the deduction shall be determined as provided in this article:

(a) If the Secretary of the Treasury is unable satisfactorily to determine the average amount of annual net income of the trade or business for the prewar period;

(b) If the Secretary of the Treasury upon complaint finds that during the prewar period the percentage of the net in-

come to the invested capital of the taxpayer was lower by 1 per cent or more than *than* the percentage of the net income to the invested capital of representative corporations, partnerships or individuals engaged in a like or similar trade or business during the same period.

(c) If, in the case only of a domestic corporation or partnership which was in existence during the prewar period, or if a citizen or resident of the United States who was engaged in the trade or business during the prewar period, the Secretary of the Treasury upon complaint finds that during the prewar period there was no net income from the trade or business.

In such cases the deduction shall be—

(1) An amount equal to the same percentage of the invested capital for the taxable year which the average deduction (determined in the same manner as provided in Article 21, without including the $3,000.00 or $6,000.00 therein referred to) for such year of representative corporations, partnerships, or individuals engaged in a like or similar trade or business, is of their average invested capital for such year, plus

(2) In the case of a Domestic Corporation $3,000.00, and in the case of a Domestic Partnership or a Citizen or Resident of the United States $6,000.00." * * *

[fol. 13] Third

Special Assessment Claimed under Section 210 of the Act of 1917

Agent's report, dated May 24, 1921, for the year 1917 shows the following:

Invested capital	$28,416.30
Sales	218,019.12
Gross profit	119,746.02
Salaries of officers	3,300.00
Net income	16,940.00
Excess profits tax	6,228.48

The percentage of Excess Profits Tax to net income shown above is approximately 37%.

It is believed that this is an abnormal percentage of Excess Profits Tax to Net Income and that a comparison with the tax paid by other corporations in the same line of business similarly situated will show that it is in excess of the tax paid by representative concerns in the same line of business.

It is also believed that the fact that taxpayer had no prewar net income and invested capital creates an additional abnormal condition entitling it to consideration for Special Relief.

It is further believed that the fact that the low officers' salaries paid during this year creates an abnormal condition in net income.

The following officers' salaries were paid:

President	$1,800.00
Treasurer	1,500.00
	$3,300.00

[fol. 14] The busines was incorporated February 10, 1916, at which time it took over a going business conducted for many years by the President, George Moore. Stock was issued for the tangible assets only and no value was placed on the Good Will. There is no doubt but that Good Will existed and that its value should have been capitalized. It is believed that this creates a further abnormal condition in Invested Capital.

Fourth

Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in Net Income for 1917

It is believed that the agent was in error in eliminating the following items from assets shown on balance sheet as of December 31, 1916:

Wagons	$1,750.00
Tubs, cans and cabinets	1,000.00
Furniture and fixtures	300.00
Accounts receivable	819.87
Notes receivable	400.00
	$4,269.87

and that these amounts should be restored to Invested Capital, an audit is now being made of taxpayers' books to determine the correctness of these adjustments as well as the adjustments made in Net Income for the year 1917.

The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

If the audit now being made reflects a difference result it will be submitted as additional evidence.

[fol. 15] STATE OF GEORGIA,
County of Fulton:

Personally appeared before me Wm. M. Leppard, who, being duly sworn, deposes and states:

That he has been employed by George Moore Ice Cream Co., Inc., to prepare the attached claim for refund for the calendar year 1917.

That he has prepared said claim from the records of taxpayer and from his knowledge of the Income Tax Regulations and that the statements therein given as facts he knows to be true and all other statements made upon information and belief, he believes to be true.

Wm. M. Leppard.

Sworn to and subscribed before me this the 4th day of November, A. D. 1927. November, 1927. R. B. Fortum, Notary Public, State at Large, Ga.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S DEMURRER TO AMENDED PETITION—Filed April 11, 1931

(Caption omitted)

Now comes J. T. Rose as United States Collector of Internal Revenue for the District of Georgia, the above named defendant, and demurs generally and specially to plaintiff's original petition as amended filed in the above entitled case on the 28th day of March, 1931, and for demurrer says:

[fol. 16] General

1. Because plaintiff's petition as amended fails to set forth a cause of action against this defendant.

Special

1. Defendant demurs specially to Paragraph 6 of said petition as amended because the facts are not clearly stated and the defendant is not sufficiently notified in detail as to the facts contained in said letter and because said letter is not made a part of said paragraph as an Exhibit thereto, and further because said paragraph states conclusions drawn from said letter and because it is not shown what the facts are claimed to be set forth in detail in said letter as to items of income and invested capital.

2. Defendant demurs specially to Paragraphs 8 and 9 of said petition as amended because the facts as stated in said paragraphs do not show a compliance with the law in regard to the plaintiff being required to make payment under protest and the facts as stated in said paragraphs do not show that the payment was made under protest.

3. Defendant demurs specially to Paragraph 11 of said petition as amended because this defendant is not responsible for any act performed by Revenue Agent H. E. Smith and he further demurs specially for the reason that it does not appear whether the determination that plaintiff was rightfully entitled to a refund of $4,551.01 was made by the Revenue Agent or by the Commissioner. Said paragraph fails to state that the United States Commissioner of Internal Revenue determined that plaintiff was rightfully entitled to a refund of said amount based upon a correct tax liability of $2,322.98.

[fol. 17] 4. Plaintiff further specially demurs to Exhibit "B" referred to in said Paragraph 11 and attached to said petition because it is irrelevant, immaterial, and has no binding force on this defendant.

5. Defendant demurs to the last paragraph in said petition as amended which is in the following words:

"Plaintiff further amends said petition by striking any and all parts of questions 1 and 2 of said original petition

together with all amendments thereto in conflict with this amendment,"

because it is not definitely stated which parts of questions 1 and 2 of said original petition are in conflict with this amendment and defendant is not put upon notice what parts of the original petition he is required to answer.

Wherefore defendant prays judgment of the Court that his demurrer be sustained and that plaintiff's petition as amended be dismissed.

C. P. Goree, Assistant United States Attorney and Attorney for the Defendant.

I hereby certify that the foregoing demurrer, general and special, is well founded in point of fact in my opinion.

C. P. Goree, Assistant United States Attorney and Attorney for the Defendant.

[File endorsement omitted.]

[fol. 18] In United States District Court

Opinion—Filed Sept. 30, 1931

(Caption omitted)

Wm. H. Barrett, District Judge:

The petition of plaintiff as amended is in one count and alleges in brief that on April 1, 1918, plaintiff filed its corporation income tax return for the year 1917, disclosing a loss of $21,037.25 and no tax liability; that the commissioner of internal revenue caused an audit to be made of the books of plaintiff and as a result thereof declared a tax liability of $6,871.18; that "the tax liability so determined was based upon and resulted from certain adjustments made in net income and invested capital of plaintiff"; that such amount was duly assessed in November, 1921, and thereafter said J. T. Rose, acting as Collector of Internal Revenue, demanded of plaintiff the principal sum of $6,874.00 and interest; that plaintiff under compulsion and duress paid said Rose on November 5, 1923, the sum of

$6,874.00; that on November 5, 1927, plaintiff filed with said collector a claim for refund, of which a copy is attached (all parts of such claim for refund have been eliminated by the amendments to the petition except this:

"Fourth. Apparent errors in adjustments in invested capital at December 31, 1916, and in net income for 1917.

It is believed that the agent was in error in eliminating the following items from assets shown on balance sheet as of December 31, 1916:

Wagons	$1,750.00
Tubs, cans and cabinets	1,000.00
Furniture and fixtures	300.00
Accounts receivable	819.87
Notes receivable	400.00
Total	$4,269.87

[fol. 19] and that these accounts should be restored to Invested Capital. An audit is now being made of taxpayer's books to determine the correctness of these adjustments as well as the adjustments made in Net Income for the year 1917.

The original return for this year reflected a loss of $21,-047.25. The Agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

If the audit now being made reflects a different result it will be submitted as additional evidence");

that "on or about November 13, 1928, and January 2nd, 1929, detailed statements showing all of the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim; that the Commissioner accepted the claim without objecting to it as sufficient in form and had the same under consideration from November 5, 1927; that the amendments to the claim were filed prior to May 1, 1929, and before the Commissioner had acted on the claim and no objection was made to the sufficiency of the claim until June 20, 1929; that said claim was supplemental data was referred by the Commissioner of Internal Revenue to the internal revenue agent

in charge, Atlanta, Georgia, and revenue agent H. E. Smith on February 21, 1929, wrote a letter to W. M. Leppard, representing plaintiff, that plaintiff was entitled to a refund of $4,551.01 (by amendment, allowed August 10, 1931, the facts upon which such letter was based are set forth as follows:

"Net Income on which Commissioner based additional assessment of	$6,873.99	$16,940.18
[fol. 20] Less:		
Coca Cola rebates due Customers at December 31, 1917	$5,666.10	
Checks outstanding for purchases December 31, 1917	2,188.55	
Total	$7,854.65	
Plus:		
Checks issued in 1916 and paid in 1917	460.82	
Net reduction		7,393.83
Corrected Net Income		9,546.35

These items are definitely identified on Schedule G of Exhibit 'D' of the amendment to the claim, filed January 2, 1929, with the exception of the item of $460.82, which is on Schedule 'B' of said amendment to the claim"),

and that on September 18, 1929, the Commissioner of Internal Revenue rejected said claim for refund in full.

There is nothing to indicate that the Commissioner of Internal Revenue authorized Smith to bind the government or that the commissioner ratified Smith's action. There was no protest made at the time of payment by the plaintiff.

The defendant demurs to such petition generally and on five special grounds.

Defendant plants himself squarely upon the principle involved in the following language of Justice Holmes in Rock Island etc. v. United States, 254 U. S. 141, 143:

"Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with."

[fol. 21] In but one case do I find this principle criticized even by implication and that, it seems to me, is more a criticism of the legislative rather than the judicial branch of the government, when Judge McDermott, in Howbert v. Penrose, 38 Fed. (2nd) 577, (10th C. C. A.), declares, after citing such statement that "The government ought to turn square corners when dealing with its citizens."

Two reasons are urged in support of the general demurrer.

1. The tax was paid without protest. It is not questioned that if this suit had been filed prior to the Revenue Act of 1924 it could not be maintained against such objection; but the plaintiff insists that Sec. 1014(a) of such Revenue Act, amending Rev. St. Sec. 3226, (U. S. C. A.) Title 26, Sec. 156, reversed such rule. A review of the cases dealing with this section is so fully made by Judge Burrows in Warner v. Walsh, 27 Fed. (2nd) 952 it would be supererogatory to repeat it here. The subsequent decision of Judge Brewster, in Leach v. Nichols, 42 Fed. (2nd) 918, does not alter my opinion that Judge Burrows' opinion was correct.

2. Title 26, Sec. 156 U. S. C. A. provides:

"No suit or proceeding shall be maintained in any Court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *"

[fol. 22] Article 1304, Regulations 69, of the Treasury Department contains the following provision:

"Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions as to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth in detail under oath."

Plaintiff's original claim for refund was filed on the last day allowed by law. By amendments all elements of such

claim for refund have been abandoned except the "Fourth," as set forth in the foregoing statement. The aforesaid letter from H. E. Smith, revenue agent, under date of February 21, 1929, is as follows:

"Find herewith agreement Form 866 prepared for the signatures of the officers of the above named (plaintiff) corporation. You will note that the corrected tax liability is $2,322.98. Originally, or previously assessed $6,873.99, refund due $4,551.01.

The amended net income upon which this tax is computed is $9,546.35, arrived at as explained to you in conference the other day.

Kindly have this document signed by the president, attested by the secretary, the corporation seal affixed, and dated, and return to me in the enclosed envelope at the earliest possible date."

Manifestly the claim now urged by the plaintiff is based upon such letter.

The most casual examination discloses that this can not fairly be considered an amendment of the original claim for refund but, fairly considered, is an original claim. As such it is filed too late. It is deemed unnecessary to elaborately discuss the decisions bearing upon this question. In addition to the principle in Rock Island etc. v. United States, [fol. 23] supra, reference may be had to Art Metal Construction Co. v. United States, 47 Fed. (2nd) (2nd C. C. A.) 558; United States v. Felt & Tarrant Mfg. Co., 51 Sup. Ct. Rep. 376, and Mutual Life Insurance Company of New York v. United States, Court of Claims, 49 Fed. (2nd) 662.

The result is that the general demurrer will be sustained and this renders unnecessary consideration of the special demurrers.

Let an order be taken accordingly.

This 28th day of September, 1931.

Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING GENERAL DEMURRER AND DISMISSING PLAINTIFF'S PETITION AS AMENDED—Filed Oct. 3, 1931

In conformity with the Court's Opinion handed down and filed in this case on the 30th day of September 1931, it is considered, ordered and adjudged by the Court that the foregoing General Demurrer be and the same is hereby sustained and that plaintiff's petition as amended be and the same is hereby dismissed.

This 2nd day of October, 1931.

W[illegible]. H. Barrett, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Jan. 2, 1932

(Title omitted)

The petitioner, George Moore Ice Cream Company, a corporation organized and existing under and by virtue of the [fol. 24] laws of the State of Georgia, being aggrieved by the order and judgment made and entered on the third day of October, 1931, by this Court, which sustains the general demurrer filed by the defendant to plaintiff's petition, and dismissing the proceeding in conformity with an opinion rendered by the Court on September 30, 1931, prays that this appeal may be allowed and that a transcript of the record of the proceedings and papers upon which the said order and decision were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

Dated Atlanta, Georgia, this 28th day of December, 1931.

D. J. Gantt, J. C. Murphy, Attorneys for Petitioner, 427 Hurt Bldg., Atlanta, Ga.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEAL—Filed Jan. 2, 1932

(Caption omitted)

On reading the petition of George Moore Ice Cream Company, made on its behalf by D. J. Gantt and J. C. Murphy, attorneys for said corporation dated the 28th day of December, 1931, for appeal and consideration of assignment of errors presented therewith it is

Ordered that the appeal herein be allowed as prayed for, and it is further

[fol. 25] Ordered that a certified transcript of record of all proceedings be transmitted to the Circuit Court of Appeals for the Fifth Circuit.

Dated Atlanta, Georgia, December 30th, 1931.

Wm. H. Barrett, Judge of the United States District Court for the Northern District of Georgia.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Jan. 2, 1932

(Caption omitted)

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which it will rely upon the prosecution of the appeal in the above entitled cause from the order made and entered herein by this Court on the third day of October, 1931.

The Court erred in sustaining the general demurrer to plaintiff's petition, and in dismissing said petition, for the following reasons:

1. The Court erred as a matter of law in entering an order dismissing plaintiff's petition and proceeding on the ground that said petition failed to state a cause of action against the defendant.

2. The Court erred in holding and finding by his opinion that plaintiff could not recover the amount sued for on the ground that the payment had been made without protest.

3. The Court erred as a matter of law in holding that the claim for refund, a copy of which set up in the original petition and amendments thereto, was not sufficient to authorize recovery under title 26, Section 156 United States Code of America, and under Article 1304, Regulation 69, of the Treasury Department.

[fols. 26 & 27] 4. The Court erred as a matter of law in holding and finding that the information and facts submitted to the Commissioner of Internal Revenue as set forth in amendment allowed by the Court September 28, 1931, was not to be considered an amendment to the original claim for refund, but, finally considered, is an original claim.

5. The Court erred in sustaining the general demurrer and in failing to hold that said petition stated a good cause of action.

Wherefore plaintiff prays the judgment of the District Court of the United States for the Northern District of Georgia, be reversed and that the United States District Court be directed to hear and consider such evidence as may be submitted by plaintiff in support of its complaint, and to proceed with the trial of the cause according to law.

Dated Atlanta, Georgia, December 29, 1931.

D. J. Gantt, J. C. Murphy, Attorneys for George Moore Ice Cream Company, 427 Hurt Building, Atlanta, Georgia.

[File endorsement omitted.]

Bond on appeal for $250.00, approved and filed January 2, 1932, omitted in printing.

[fol. 28] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed Jan. 23, 1932

(Caption omitted)

To Honorable Olin C. Fuller, clerk of the United States District Court for the Northern District of Georgia:

You are hereby requested to make and certify a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit pursuant to an appeal allowed in the above entitled proceeding, to include the following:

1. Amended petition filed on behalf of Plaintiff and allowed March 28, 1931.

[fol. 29] 2. Demurrer filed by counsel for Defendant to the amended petition.

3. Opinion of Honorable W. H. Barrett, United States Judge, entered and filed on the 3rd day of October, 1931.

4. Judgment and order filed and entered the 3rd day of October, 1931, by Honorable W. H. Barrett, United States Judge, finally dismissing plaintiff's petition.

5. Plaintiff's assignments of errors.

6. Plaintiff's appeal and order allowing same.

7. Citation of said appeal.

8. This præcipe.

J. C. Murphy, D. J. Gantt, Attorneys for George Moore Ice Cream Company, Plaintiff.

Acknowledgment of Service

Service of the above præcipe admitted and a copy received this the 23d day of January, 1932. It is agreed and stipulated that the foregoing documents are all that are necessary for the consideration of the case by the United States Circuit Court of Appeals for the Fifth Circuit.

C. P. Goree, Assistant U. S. Attorney and Attorney for Defendant.

[File endorsement omitted.]

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

MEMORANDUM RE CITATION

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 31] Minute entry of argument and submission, October 12, 1932, omitted in printing.

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6522

GEORGE MOORE ICE CREAM COMPANY, INC., Appellant,

versus

J. T. ROSE, Collector of Internal Revenue for the District of Georgia, Appellee

Appeal from the District Court of the United States for the Northern District of Georgia

(November 9, 1932)

Before Bryan, Hutcheson, and Walker, Circuit Judges

OPINION OF THE COURT—Filed November 9, 1932

WALKER, Circuit Judge:

This was an action brought on March 28, 1931, by the appellant against the appellee, Collector of Internal Revenue, to recover the principal sum of $4,551.01, with interest, that sum being part of the amount, $6,871.18, assessed against appellant, in November, 1921, as a deficiency of income and profits taxes for the year 1917, and paid by him [fol. 33] on November 5, 1923. Appellant's petition alleged the filing by him on November 5, 1927, of a claim for refund. That petition as it was amended showed that the only

ground stated in the claim for refund which was relied on in the suit was the following:

"Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in Net Income for 1917.

It is believed that the agent was in error in eliminating the following items from assets shown on balance sheet as of December 31, 1916:

Wagons	$1,750.00
Tubs, cans and cabinets	1,000.00
Furniture and fixtures	300.00
Accounts receivable	819.87
Notes receivable	400.00
	$4,269.87

and that these amounts should be restored to Invested Capital, an audit is now being made of taxpayers books to determine the correctness of these adjustments as well as the adjustments made in Net Income for the year 1917.

The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

If the audit now being made reflects a different result it will be submitted as additional evidence."

The amended petition, after alleging the filing of the claim for refund, alleged as follows:

"That thereafter on or about November 13, 1928, and [fol. 34] January 2nd, 1929, detailed statements showing all of the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim; that the commissioner accepted the claim without objecting to it as insufficient in form and had the same under consideration from November 5, 1927; that the amendments to the claim were filed prior to May 1, 1929, and before the Commissioner had acted on the claim and no objection was made to the sufficiency of the claim until June 20, 1929.

Said claim for refund, together with supplemental data as recited in above paragraph, was referred by the Commissioner of Internal Revenue to the Internal Revenue

Agent in Charge, Atlanta, Georgia, and was assigned to Revenue Agent H. E. Smith for verification, and after examination he determined that plaintiff was rightfully entitled to a refund of $4,551.01 based upon a corrected tax liability of $2,322.98. Copy of letter acknowledging such corrected tax liability is attached hereto and marked Exhibit 'B'.

That thereafter on September 18, 1929, the Commissioner of Internal Revenue rejected said claim for refund in full."

The letter, a copy of which was made Exhibit 'B,' was dated February 21, 1929, and the body of it was the following:

"Find herewith agreement form 866 prepared for the signatures of the officers of the above named corporation. You will note that the corrected tax liability is $2,322.98. Originally or previously assessed $6,873.99, refund due $4,551.01.

[fol. 35] The amended net income upon which this tax is computed is $9,546.35, arrived at as explained to you in conference the other day.

Kindly have this document signed by the president, attested by the secretary, the corporate seal affixed, and dated, and return to me in the enclosed envelope at the earliest possible date."

It appears from the opinion rendered, but not from the record proper, that by amendment of the petition, allowed August 10, 1931, the facts upon which the above set out letter was based were set forth as follows:

"Net Income on which Commisisoner based additional assessment of $6,873.99		$16,940.18
Less:		
Coca Cola rebates due Customers at December 31, 1917	$5,666.10	
Checks outstanding for purchases December 31, 1917	2,188.55	
Total	$7,854.65	
Plus:		
Checks issued in 1916 and paid in 1917	460.82	
Net reduction		7,393.83
Corrected Net Income		9,546.35"

The petition as amended did not allege that the alleged payment by appellant was made under protest. The Court sustained a demurrer to the petition as it was amended, and dismissed that petition.

[fol. 36] In argument in behalf of the appellee it was contended that the action of the Court in sustaining the demurrer to the amended petition is sustainable on the grounds: (1). That the suit was not maintainable because the amended petition did not show that the alleged payment exacted of the appellant was made under protest; and, (2), That the amended petition did not show that the ground therein stated in support of the asserted right to recover was stated in the alleged claim for refund.

1. The Revenue Act of 1924 (26 U. S. C. A. §156, 43 Stat. 343) introduced into the provision with reference to suits for the recovery of taxes wrongfully collected the provision, "but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress." Prior to the enactment of the quoted provision an over-payment of income taxes without protest was not recoverable from the Collector of Internal Revenue. Fox v. Edwards, 287 Fed. 669; Warner v. Walsh, 24 Fed. (2), 449. The alleged excessive payment was made by the appellant before the enactment of that provision, but this suit was brought after that provision was enacted. That a Statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. United States v. St. Louis Star Ry. Co., 270 U. S. 1. The suit asserts a personal liability of the appellee. Sage v. United States, 250 U. S. 33. At the time of the alleged over-payment by the appellant without protest, it did not subject appellee to any enforceable liability. A result of permitting the maintenance of the suit would be to give to a subsequently enacted Statute the effect of creating a personal liability for the doing of an act which at the time it was done did not give rise to any liability. To say the least, it is not clear that the quoted provision of the Statute was intended to, or con-

[fol. 37] stitutionally could, have the effect attributed to it. Fullerton Co. v. Northern Pacific Ry. Co., 266 U. S. 435; Warner v. Walsh, 27 Fed. (2), 952. But is is not necessary to pass on the question under consideration if the allegations of the amended petition do not show that appellant would

have been entitled to recover anything if his alleged overpayment had been made under protest.

The timely filing of a claim for refund according to regulations established pursuant to Statute is a prerequisite of the existence of a right to sue for the recovery of illegally exacted taxes. 26 U. S. C. A. §156; Tucker v. Alexander, 275 U. S. 228; J. P. Stevens Engraving Co. v. United States, 53 Fed. (2), 1; Snead v. Elmore, 59 Fed. (2), 312. A Regulation in force at the time appellant's claim for refund was filed requires that "All facts relied upon in support of the claim should be clearly set forth in detail under oath." Regulations 69, Art. 1304. The only ground stated in appellant's claim for refund which was invoked by his amended petition was the one above set out. That part of the claim for refund,—which was filed on the last day on which it legally could be filed (26 U. S. C. A. §157),—consisted of the statement of a belief that error was committed in eliminating specified items of assets from the statement of appellant's invested capital, and the statement with reference to an alleged uncompleted audit that if that audit reflects a different result it will be submitted as additional evidence. The just mentioned statement with reference to an audit cannot be regarded as a clear setting forth in detail of a fact or facts relied upon in support of the claim for refund. It imported no more than that if an audit then being made should reflect a different result from the one just mentioned it would be submitted as additional evidence. It did not indicate a purpose to challenge the exacted tax on a ground other than the previously stated one based on the elimina-[fol. 38] tion from appellant's invested capital of described items of assets. The amended petition did not allege that the items mentioned were eliminated from appellant's invested capital. It challenged the exacted tax, not on a ground stated or suggested in the claim for refund, but on the ground that two described items should be deducted from the stated amount of net income upon which the challenged assessment was based, and that another described item should be added to that amount, no one of which three items was in any way mentioned in the claim for refund. It was not open to the appellant by his suit to challenge the exacted tax upon a ground wholly different from the one stated in his claim for refund. United States v. Felt & Tarrant Co., 283 U. S. 269. The allegations of appellant's amended peti-

tion do not show that it was made known to the Commissioner of Internal Revenue that the exacted tax was challenged by appellant on a ground not stated in the latter's claim for refund, or that that official considered, or was called on to consider, any ground of attack on that tax which was not stated in the claim for refund. This being so, the appellant was not entitled by his suit to challenge that tax on a ground not set out in his claim for refund. It follows that the Court did not err in sustaining the demurrer to the amended petition.

The judgment is affirmed.

[fol. 39] In United States Circuit Court of Appeals, Fifth Circuit

No. 6522

George Moore Ice Cream Company, Inc.,

versus

J. T. Rose, Collector of Internal Revenue for the District of Georgia

Judgment—November 9, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 40] [File endorsement omitted]

In United States Circuit Court of Appeals, Fifth Circuit

[Title omitted]

Petition for Rehearing—Filed November 29, 1932

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the appellant and brings this its petition for a rehearing, and for cause shows:

1

The decision promulgated by this honorable court in the above cause November 9, 1932, affirms the judgment below on the ground that the claim as filed was insufficient to authorize recovery under Section 156, title 26 U. S. C. A. and under regulations 69, article 1304.

[fol. 41]

2

The opinion apparently does not give consideration to the following allegations in appellant's petition:

"* * * that thereafter on or about November 13, 1928, and January 2, 1929, detailed statements showing all of the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim; that the commissioner accepted the claim without objecting to it as insufficient in form and had the same under consideration from November 5, 1927; that the amendments to the claim were filed prior to May 1, 1929, and before the Commissioner had acted on the claim and no objection was made to the sufficiency of the claim until June 20, 1929."

3

Petitioner shows that the United States Supreme Court granted petitions for writ of certiorari to the Court of Claims in the case of the United States, Petitioner, v. Factors and Finance Company (No. 141), and petition for writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit in the case of The United States of America, Petitioner, v. Henry Prentiss & Company (No. 234), at the October term of said court (53 S. Ct. pp. 18, 22), wherein the Supreme Court of The United States took under consideration the question of whether or not claims insufficient when filed may be amended after the expiration of the period of limitations applicable to the filing thereof, and when so amended may authorize the recovery of overpayments under said Section 156, title 26 U. S. C. A.

[fol. 42] Wherefore petitioner prays that the order heretofore entered in said cause be set aside and that petitioner be granted a rehearing.

J. C. Murphy, D. J. Gantt, Petitioner's Attorneys.

Duly sworn to by J. C. Murphy. Jurat omitted in printing.

[fol. 43] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—December 20, 1932

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] Supreme Court of the United States

Order Allowing Certorari—Filed March 20, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,372. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 675. George Moore Ice Cream Company, Inc., Petitioner, vs. J. T. Rose, Collector of Internal Revenue for the District of Georgia. Petifor a writ of certiorari and exhibit thereto. Filed February 9, 1933. File No. 37,372.

PETITION FOR A WRIT OF CERTIORARI

FILE COPY

In the Supreme Court of the
United States

OCTOBER TERM, 1938

No. 575

GEORGE MOORE ICE CREAM COMPANY,
Petitioner,

v.

J. T. ROSE, Collector of Internal Revenue
for the District of Georgia,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. C. MURPHY,
Attorney for Petitioner,
427 Hurt Building,
Atlanta, Ga.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No.....

GEORGE MOORE ICE CREAM COMPANY,
Petitioner,

v.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia,
Respondent.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of George Moore Ice Cream Company, a corporation organized and existing under and by virtue of the laws of the State of Georgia, respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner, plaintiff in the United States District Court for the Northern District of Georgia, brought suit against the Collector of Internal Revenue for the recovery of $4,551.01 alleged to be overpayment of income taxes for the taxable

year 1917. (R. 1-6.) General demurrer was filed to the amended petition which was sustained by the United States District Court on the ground that it was not alleged that protest was not made at the time the additional tax in controversy was paid and on the ground of insufficiency of the claim for refund. (R. 18-23.) The court below sustained the decision of the United States District Court upon the ground of insufficiency of the claim for refund without deciding the necessity for protest. 61 Fed. (2d) 605.

The original return for 1917 was filed April 1, 1918, and disclosed a loss of $21,037.25 and no tax liability. (R. 2.)

Thereafter the Commissioner, upon audit of the books determined a deficiency of $6,871.18 based upon adjustments to net income and invested capital, which was assessed in November, 1921 and paid Novmber 5, 1923 in order to prevent the imposition of penalties, interest, and the distraint and sale of its property. (R. 3.) Thereafter on November 5, 1927 petitioner filed a claim for refund, in form and manner prescribed by law and regulations with the Collector of Internal Revenue for the District of Georgia, the material parts of which are as follows:

"6. Amount to be refunded ..... $6,871.18.

"The deponent verily believes that this claim should be allowed for the following reasons: * * *

"Fourth.

"Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in net income for 1917. * * *

"The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

"If the audit now being made reflects a difference result it will be submitted as additional evidence."

Thereafter on or about November 13, 1928, and January 2, 1929, and before the Commissioner had acted on the claim, deailed statements showing all the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim. (R. 4, 5.) After the amendments were filed the claim was referred to an Internal Revenue Agent, H. E. Smith, who on February 21, 1929 sent to the taxpayer's attorney, Wm. M. Leppard, official form 866 for the signature of the officers and fixing the tax liability at $2,322.98 and the refund due, $4,551.01. (R. 4, 7.) The claim was rejected September 8, 1929. (R. 5.)

The original claim was based upon four grounds but all were abandoned in the suit except that of

over-assessment as shown on page 14 of the record

The amended petition was filed on the 28th day of March, 1931 and does not allege payment under protest. (R. 6.)

B. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

It is believed that the decision below is probably in conflict with the decision of this Honorable Court in the following cases: *United States, Petitioner v. Factors & Finance Company, Respondent*, No. 141, October Term, 1932, decided January 9, 1933, 53 S. Ct. 287; and *United States* v. *Memphis Oil Company*, No. 308, decided January 9, 1933, 53 S. Ct. 278.

While the court below did not decide the issue of protest as a condition precedent to suit, Judge Barrett of the United States District Court held that protest was a necessary condition precedent to recovery, the collection having been made prior to the passage of the Revenue Act of 1924 and the suit commenced thereafter. The United States District Court therefore has decided an important question of Federal law which has not been, but should be, settled by this court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of

Appeals for the Fifth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 6522, George Moore Ice Cream Company, Inc., Appellant v. J. T. Rose, Collector of Internal Revenue for the District of Georgia, Appellee, and that the said decree and judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem mete and just; and your petitioner will ever pray.

GEORGE MOORE ICE CREAM COMPANY.

By J. C. Murphy,

Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1932

No.....

GEORGE MOORE ICE CREAM COMPANY,
Petitioner,

v.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 61 Fed. (2d), page 605. The opinion of the United States District Court for the Northern District of Georgia is shown in the record, pages 18 to 23.

II

JURISDICTION.

The order of the Circuit Court of Appeals sustaining the decision of the United States District Court for the Northern District of Georgia was

entered November 9, 1932. Petition for rehearing was filed November 29, 1932, and denied December 20, 1932. (R. 40, 43.) Jurisdiction is conferred upon this court by Section 240(a) of the Judicial Code as amended by the act of February 13, 1925.

The suit in the District Court by the plaintiff was for the recovery of amounts paid as additional corporation income taxes, (R. 2-5), and the decisions below involve construction of said taxing acts. (R. 18-23, R. 32, 38.)

III

STATEMENT OF THE CASE.

A full statement of the case has been given under the head "A" in the petition and, in the interest of brevity, the statement is not repeated at this point.

IV

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals for the Fifth Circuit erred in finding and holding that the claim for refund, and allegations in connection therewith, were not sufficient to authorize recovery under 26 U. S. C. A. paragraph 156, 43 Stat. 343.

2. The United States District Court for the Northern District of Georgia erred in finding and holding that payment under protest is a condition precedent to recovery under said section.

3. The United States District Court for the Northern District of Georgia errer in sustaining the General Demurrer and dismissing the peti-

tion, and the United States Circuit Court of Appeals for the Fifth Circuit erred in sustaining the court below.

V

ARGUMENT

POINT A

THE CLAIM FOR REFUND WAS SUFFICIENT BECAUSE AMENDED PRIOR TO REJECTION

The decision below is contrary to and in conflict with the decision of this Honorable Court in the following cases: *United States* v. *Memphis Oil Company*, No. 308, October Term, 1932, decided January 9, 1933, 53 S. Ct. 278; *United States* v. *Factors & Finance Company*, No. 141, October Term, 1932, decided January 9, 1933, 53 S. Ct. 287.

The petition alleges that the claim for refund was amended before rejection by a detailed statement showing all of the items entering into and making up net income and invested capital. (R.4.) The original claim clearly indicated that the net income and invested capital would be questioned. (R. 14.)

POINT B

THE SUIT WAS BROUGHT AFTER THE PASSAGE OF THE REVENUE ACT OF 1924 AND THEREFORE PROTEST WAS NOT NECESSARY

The Revenue Act of 1924 by Section 1014 (43 Stat. 343), amended Section 3226 by providing, "But such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been

paid under protest or duress", and by Section 1014(b) by providing that the section should not affect any proceeding in court instituted prior to the enactment of the act.

The payment of the tax in controversy was made prior to the enactment of the Revenue Act of 1924, (R. 4), but the suit was commenced after the passage of that Act. (R. 6.)

Without the amendment to Section 3226 R. S. (C. 234, 1014(a) 43 Stat. 343) eliminating the necessity for protest, petitioner would not have had a cause of action against the defendant. Congress had the power to create a cause of action which had not existed before. *Sage et al.* v. *United States*, 250 U. S. 33. *United States* v. *Hvoslef*, 237 U. S. 1. And Congress had such power in suits against Collectors of Internal Revenue as well as in suits against the United States. *Daniel Reeves, Inc.* v. *Anderson*, No. 463; *Wright & Taylor, Inc.* v. *Lucas, Collector of Internal Revenue*, No. 565, decided January 26, 1931. 282 U. S. 409.

The necessity for protest did not go to the question of the existence of liability, and therefore the rule did not create a fixed right. *Mascot Oil Company* v. *United States*, No. 400 and *Heiner, Collector of Internal Revenue*, v. *Erie Coal & Coke Company*, No. 508, decided January 26, 1931. 282 U. S. 434.

The following decisions of District Courts sustain the contention that the amendment eliminat-

ing the necessity for protest applied to all suits thereafter filed, regardless of prior payment. *Weir* v. *McGrath, Collector of Internal Revenue*., 52 *McCaughn*, 52 Fed. (2d) 205; *Leach* v. *Nichols*, 42 Fed. (2d) 918; *Warner* v. *Walsh*, 24 Fed. (2d) 449.

The intention of Congress to make the amendment eliminating protest apply to all suits thereafter filed is clearly indicated by the Senate Report applicable thereto, which is presented in full as follows:

> "Section 1114. The provisions of Section 1318 of existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums, or penalties paid, that such amounts shall have been paid under protest or duress. The fact protest was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed." Report No. 398, 68th Congress, First Session.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end

a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals and finally reverse it.

J. C. MURPHY,

Counsel for Petitioner.

February 1, 1933.

FILE COPY

FILED
APR 12 1933
CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 675

GEORGE MOORE ICE CREAM COMPANY,
Petitioner,

vs.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER

J. C. MURHPY,
Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

NO. 675

GEORGE MOORE ICE CREAM COMPANY
Petitioner,

v.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 61 Fed. (2d), page 605. The opinion of the United States District Court for the Northern District of Georgia is shown in the record, pages 18 to 23.

II.

JURISDICTION.

The order of the Circuit Court of Appeals sustaining the decision of the United States District Court for the Northern District of Georgia was entered November 9, 1932. Petition for rehearing was filed November 29, 1932, and denied December 20, 1932. (R. 40, 43.) Jurisdiction is conferred upon this court by Section 240(a) of the Judicial Code as amended by the act of February 13, 1925.

The suit in the District Court by the plaintiff was for the recovery of amounts paid as additional corporation income taxes (R. 2-5), and the decisions below involve construction of said taxing acts. (R. 18-23, R. 32-38.)

Certiorari was granted by this Court March 20, 1933.

III.

SUMMARY STATEMENT OF THE CASE.

Petitioner, plaintiff in the United States District Court for the Northern District of Georgia, brought suit against the Collector of Internal Revenue for the recovery of $4,551.01 alleged to be overpayment of income taxes for the taxable year 1917. (R. 1-6.) General demurrer was filed to the amended petition which was sustained by the United States District Court on the ground that it was not alleged that protest was made at the time the additional tax in controversy was paid and on the ground of insufficiency of the claim for refund. (R. 18-23.) The court below sustained the decision of the United States District Court upon the ground of insuf-

ficiency of the claim for refund without deciding the necessity for protest. 61 Fed. (2d) 605.

The petition alleged the following facts material to the questions presented:

The original return for 1917 was filed April 1, 1918, and disclosed a loss of $21,037.25 and no tax liability. (R. 2.)

Thereafter the Commissioner, upon audit of the books determined a deficiency of $6,871.18 based upon adjustments to net income and invested capital, which was assessed in November, 1921, and paid November 5, 1923, in order to prevent the imposition of penalties, interest, and the distraint and sale of its property. (R. 3.) Thereafter on November 5, 1927, petitioner filed a claim for refund, in form and manner prescribed by law and regulations with the Collector of Internal Revenue for the District of Georgia, the material parts of which are as follows:

"6. Amount to be refunded ..... $6,871.18.

"The deponent verily believes that this claim should be allowed for the following reasons: * * *

"Fourth.

"Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in net income for 1917. * * *

"The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

"If the audit now being made reflects a different result, it will be submitted as additional evidence."

Thereafter on or about November 13, 1928, and January 2, 1929, and before the Commissioner had acted on the claim, detailed statements showing all the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim. (R. 4, 5.) After the amendments were filed the claim was referred to an Internal Revenue Agent, H. E. Smith, who on February 21, 1929, sent to the taxpayer's attorney, Wm. M. Leppard, official form 866 for the signature of the officers and fixing the tax liability at $2,322.98 and the refund due, $4,551.01. (R. 4, 7.) The claim was rejected September 8, 1929. (R. 5.)

The original claim was based upon four grounds but all were abandoned in the suit except that of over-assessment as shown on page 14 of the record.

The amended petition was filed on the 28th day of March, 1931, and does not allege payment under protest. (R. 6.) The ground on which recovery is sought is overpayment of the tax.

IV.

QUESTIONS PRESENTED.

—1—

Are the allegations concerning the claim for refund sufficient to authorize recovery under 26 U. S. C. A., Section 156 (R. S. 3226; June 2, 1924, c. 234, 1014(a), 43 Stat. 343)?

—2—

Is it necessary to allege and prove that the tax in controversy was paid under protest in order to authorize recovery?

V.

SPECIFICATION OR ERRORS.

1. The United States Circuit Court of Appeals for the Fifth Circuit erred in finding and holding that the claim for refund, and allegations in connection therewith, were not sufficient to authorize recovery under 26 U. S. C. A. paragraph 156, 43 Stat. 343.

2. The United States District Court for the Northern District of Georgia erred in finding and holding that payment under protest is a condition precedent to recovery under said section.

3. The United States District Court for the Northern Dis-

trict of Georgia erred in sustaining the General Demurrer and dismissing the petition, and the United States Circuit Court of Appeals for the Fifth Circuit erred in sustaining the court below.

VI.

APPLICABLE STATUTES.

Section 1014 Revenue Act of 1924 (June 2, 1924, 4:01 P. M. c. 234, 1014(a), 43 Stat. 343; 26 U. S. C. A. 156):

> "Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended, to read as follows:
>
> " 'Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part

of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.'

"(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act."

VII.

SUMMARY OF ARGUMENT

POINT A.

The allegations concerning the claim for refund are sufficient to authorize recovery under the decision of this Honorable court in the following cases: *United States v. Memphis Oil Company*, No. 308, October Term, 1932, decided January 9, 1933, 53 S. Ct. 278; *United States v. Factors & Finance Company*, No. 141, October Term, 1932, decided January 9, 1933, 53 S. Ct. 287.

POINT B.

Payment of the tax in controversy under protest is not a condition precedent to recovery because Section 3226 Revised Statutes was amended by the Revenue Act of 1924 spcifically authorizing suit, whether or not such tax had been paid under protest or duress.

POINT C.

Congress intended this amendment to apply to suits against Collectors of Internal Revenue because it was only in such suits that payment under protest was a condition precedent to recovery.

POINT D.

Congress intended to make the amendment eliminating protest apply to all suits thereafter filed because the language used by the applicable reports clearly show that purpose. *Senate Report No.* 398, 68*th Congress, First Session, pages* 44, 45; *House Report No.* 179, 68*th Congress, First Session, pages* 33, 34. The purpose of Congress was to place taxpayers uninformed as to technical requirements upon an equality with well-advised taxpayers.

POINT E.

The prior necessity for protest did not afford the Collector of Internal Revenue any relief because under the law he was compelled to pay into the treasury of the United Stats all sums collected regardless of protest. The statute had therefore removed previously all benefit accruing to the Collector by virtue of protest. (R. S. 3210; May 10, 1916, c. 117, 1, 39, Stat. 86.)

POINT F.

The prior necessity for protest did not go to the question of the existence of the liability, and therefore the rule did not create a fixed right. *Mascot Oil Company v. United States; Heiner, Collector, v. Erie Coal and Coke Company,* 282 U. S. 434.

POINT G.

Congress had the power to create a cause of action which

had not existed before. *Sage et al. v. United States*, 250 U. S. 33; *United States v. Hvoslef*, 237 U. S. 1. Congress had such power in suits against Collectors of Internal Revenue. *Daniel Reeves, Inc., v. Anderson; Wright & Taylor, Inc., v. Lucas*, 282 U. S. 409.

VIII.

ARGUMENT.

POINT A.

Sufficiency of Claim. The original claim for refund, copy of which was attached to petition as an exhibit, and shown in the record, pages 8 to 15, sought the refund of $6,871.18 and assigned four reasons why the claim should be allowed. The fourth reason only is relied upon in the proceeding at bar. These reasons were numbered "First," "Second," "Third" and "Fourth." The fourth reason urged for the allowance of the claim was on the ground "Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in Net Income for 1917."

The first paragraph under this heading dealt with errors in the invested capital setting forth in detail certain items asserted to have been erroneously eliminated. The second paragraph dealt with the question of net income pointing out that the original return revealed a loss of $21,047.25 and that the agent had made adjustments to reveal a profit of $16,940.18. The final paragraph stated that an audit was being made, and that if same reflected a different result it would be submitted as additional evidence.

Paragraph 10 of the petition alleges that detailed statements constituting amendments to the claim were filed prior to the rejection of the claim, and that these detailed statements disclosed all of the items entering into and making up net income. (R. 4.) The succeeding paragraph of the petition alleges that this claim for refund together with the amendments was referred to Revenue Agent H. E. Smith for verification and that he determined that petitioner was rightfully entitled to a refund of $4,551.01. (R. 4.) His letter shows the correct tax liability to be $2,322.98 and that the tax previously assessed was $6,873.99 and that petitioner was due a refund of $4,551.01. (R. 7.)

It is believed that the facts in the case at bar bring it within the ambit of the decisions of this court in *United States v. Factors & Finance Company*, 53 S. Ct. 287, and *United States v. Memphis Oil Company*, 53 S. Ct. 278, and that therefore the allegations concerning the claim for refund are sufficient.

POINT B.

The petition does not contain any allegation that the tax in controversy was paid under protest. It is assumed that if protest is a condition precedent to recovery it must ba alleged and proved and that it is not an affirmative defense to be pled by the defendant. The tax in controversy was paid prior to the enactment of the Revenue Act of 1924 on November 5, 1923, and the suit was filed after the passage of the Revenue Act of 1924. It is our position that the amendment to Section 3226 made by the Revenue Act of 1924 removed the necessity of petitioner to allege and prove protest,

and definitely authorized the maintenance of the suit whether or not such tax had been paid under protest or duress. The section as re-enacted by the Revenue Act of 1924 as Section 1014 of that act contained the following provision which was not previously included in Revised Statutes 3226: "But such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress." (June 2, 1924, 4.01 P. M., c. 234, 1014 (a) 43 Stat. 343.) By sub-section (b) of the same section it was provided that the Revised Statutes 3226 as re-enacted by that section should not apply to pending suits. It is thought that the language used in this amended section of the Revised Statutes definitely authorized the maintenance of this suit although the tax was not paid under protest. The language will admit of no other reasonable construction.

The contention that the amendment to Section 3226 Revised Statutes removed the necessity to allege and prove duress and protest is sustained by the language used by the United States Circuit Court of Appeals for the Second Circuit in the case of *Daniel Winant et al. v. Gardner, Collector,* 29 Fed. (2d) 836, in which that court used the following language: "In 1924, Congress (Section 1014 (a), Revenue Act of 1924), amended Revised Statutes Section 3226 by providing that in suits against Collectors the plaintiff need not prove duress and protest, but sub-division (b) of the amending section makes it inapplicable to pending actions. The harsh rule, of which Fox v. Edwards, 287 Fed. 689 is a late illustration, therefore remained in force as respects the action at bar. In spite of the injustice of the result we can find no escape." That proceeding was pending when the Revenue Act of 1924

was passed and was therefore controlled by sub-section (b) of the amending section. While the court affirmed the judgment below, the concluding sentence of the decision clearly reflects the court's opinion in which it says: "Happily such a situation can no longer arise, but we have no power to compel the defendant to concede what justice would seem to demand."

POINT C.

Undoubtedly Congress intended the amendment to Section 3226 R. S. to apply in suits against Collectors of Internal Revenue.

The Court of Claims has definitely held that, in suits to recover income taxes brought against the United States, protest was not a necessary condition precedent to recovery. The Court of Claims, in *Farmers Loan and Trust Company et al. v. The United States*, decided February 20, 1928, 64 Ct. Claims 516 and in the case of *Hyatt Roller Bearing Company v. United States*, 43 Fed. (2d) 1008, held that Section 252 of the Revenue Act of 1918 (40 Stat. 1085) is mandatory in its provision that any overpayment of tax shall be refunded or credited and that Sections 1316 and 1318 of the Revenue Act of 1921 (42 Stat. 314; 26 U. S. C. A. 156, 157) authorized suits for refund if claims for refund are filed, and that under those sections and Section 145 of the Judicial Code (28 U. S. C. A. 250) the right to maintain the suits and the authority of the court to render judgments for refunds can not be made to depend upon whether the tax was paid under protest.

Section 3226, Revised Statutes, has been universally held

by all of the courts to apply in suits against Collectors of Internal Revenue. In one of the earlier cases, if not the earliest case, decided by this Honorable Court, *Cornelius Brainard, Collector of Internal Revenue, v. Henry G. Hubbard,* 12 Wall. 1-18, 79 U. S. 1, decided April 10, 1871, not only held that the section applied in a suit against a Collector of Internal Revenue but also held that the section applied retroactively to payments theretofore made, but did not apply to suits commencing prior to the enactment of the section. In that case the court also held that a suit against a Collector of Internal Revenue was one of the remedies necessarily implied from the acts of Congress for the recovery of taxes erroneously paid, and that such remedies may be changed or modified at the pleasure of the lawmaker.

POINT D.

The history of the amendment to Section 3226 Revised Statutes shows clearly that Congress intended to apply the amendment to all suits thereafter filed. The report of the Committee upon Ways and Means of the House (*House Report* No. 179, 68th Congress, First Session, pages 33 to 34) and the report of the Finance Committee of the Senate (*Senate Report* 398, 68th Congress, First Session, page 44), both show the following:

> "Section 1114. The provisions of Section 1318 of existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums, or penalties paid, that such amounts shall have been paid under protest or duress. The fact protest was made has little bearing on the question whether the tax was prop-

erly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed."

The conclusion is necessarily implied from Sub-section (b) of Section 1014 of the Revenue Act of 1924, that the amended section should apply to all suits thereafter commenced. The sub-section provides, "This section shall not affect any proceeding in court instituted prior to the enactment of this act." Had Congress intended to exempt payments made prior to the passage of the act, undoubtedly language to that effect would have been used. Sub-section (b) necessarily implies that the amended section 3226 shall apply to all suits thereafter commenced. It is obvious that the framers of the amendment believed, in the absence of this sub-section, that it would have applied even to pending suits.

We submit that the language used by Congress in the amendment, and in the reports of the Committee on Ways and Means of the House, and the Finance Committee of the Senate, unquestionably indicated the intention of Congress to make the amendment immediately effective to correct well recognized evils of the existing rule, and to relieve taxpayers, who, under the unsettled construction of the income tax provisions, were not well advised and could not have been apprised of the amunts due. The many decisions of this court attest the many complex questions arising under the various revenue acts. It seems certain that it was the purpose of Congress to permit taxpayers to recover amounts erroneously paid, and to relieve them from unnecessary technical handicaps.

POINT E.

The common law rule requiring protest as a condition precedent to recovery in suits against tax collectors obviously was for the protection of tax collectors in order that the money might be held out of the public treasury until the question could be adjudicated. The rule constituted substantial protection to tax collectors. But in the case of Collectors of Internal Revenue the applicable statutes definitely require all taxes collected by them to be paid into the treasury of the United States daily regardless of whether or not the payment is made under protest. (R. S. 3210.) It follows, therefore, that the Collector of Internal Revenue, the defendant below, is in the identical position now with respect to the payment of a judgment upon the case at bar as he would have been if the tax had been paid under protest. Under the facts as alleged in the petition a certificate of probable cause would follow as a matter of course. It is alleged that the tax was regularly assessed upon an audit made by the Commissioner of Internal Revenue and it is believed that no court, under the facts alleged, would decline such a certificate.

It is true that this is an action against a Collector of Internal Revenue and that he at least has a technical interest in the case, but that interest is too insubstantial and remote to affect the application of the amended Section 3226, Revised Statutes. The case at bar is essentially a matter between the United States and one of its citizens. When the United States promulgates a rule that it will not insist upon duress and protest as a condition precedent to the recovery of money, which by hypothesis it ought not to keep, it seems clear that the policy so declared should be taken as immediately effective.

The personal interest of the Collector of Internal Revenue has been amply protected by the United States by authorizing the Commissioner of Internal Revenue to repay to any Collector the full amount of such sums of money as may be recovered against him in any court, with the costs and expense of suit. (26 U. S. C. A. 149; R. S. 3220). It is therefore submitted that the Collector of Internal Revenue has no substantial interest in the proceeding at bar. We believe that this principle was recognized by this court in *Graham et al v. Goodcell* and related cases, decided January 26, 1931, (282 U. S. 409). Those cases involved a construction of Section 611 of the Revenue Act of 1926, and used this language: "Nor is there any warrant for making any distinction in this respect between suits which had been brought against the Collector individually, and those pending against the United States."

POINT F.

It is believed that the rule existing prior to the enactment of the Revenue Act of 1924 making protest a condition precedent to the recovery of income taxes in proceedings against Collectors of Internal Revenue did not go to the question of the existence of the liability, and therefore did not create a fixed right which could not be changed by Congress. This court in the case of *Graham et al. v. Goodcell*, 282 U. S. 409, said:

"It is apparent, as the result of the decision, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute

aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applid without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist."

It is believed the principle above quoted should, in equity, be applied to the case at bar because admittedly the Government has collected money from petitioner in excess of the amount regularly due. The same principle was followed in *Mascot Oil Company v. United States*, 282 U. S. 434.

The case at bar is similar in some respects to the case of *United States v. Hvoslef*, 237 U. S. 1. In that case a claim for refund was filed under act of July 27, 1912, for stamp taxes paid prior to that time. The payment was made without protest; it had been certified by the Collector to be correct in its statement of facts but the Commissioner of Internal Revenue had rejected it for the reason that the act was not applicable. It would appear from the case that the payment was made before the passage of the act and the suit filed after the passage of the act. The court held that the act was applicable not only where such taxes were paid before the refunding act was passed but also where subsequently they were wrongfully collected in violation of its provisions.

DECISIONS OF LOWER COURTS.

The following decisions of lower courts sustain the contention that the amendment to Section 3226 eliminating the necessity for protest applied to all suits thereafter filed regardless of prior payment. *Weir v. McGrath,* 52 Fed. (2d) 201; *Electric Storage Battery Company v. McCaughn,* 52 Fed. (2d) 205; *Warner v. Walsh,* 24 Fed. (2d) 449; *Beatty v. Heiner,* 10 Fed. (2d) 390; *Leach v. Nichols,* 42 Fed. (2d) 918;*Winant v. Gardner,* 29 Fed. (2d) 836.

CONCLUSION.

It is therefore respectfully submitted that the decision of the court below should be reversed.

J. C. MURPHY,

Counsel for Petitioner.

April 8, 1933.

FILE COPY

No. 679

In the Supreme Court of the United States

October Term, 1952

[redacted]

v.

J. T. Ross, Commissioner of Internal Revenue, and Director of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]

BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 675

GEORGE MOORE ICE CREAM COMPANY, INC.,
petitioner

v.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR
the District of Georgia

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case because:

1. The question whether protest was a necessary condition precedent to recovery (turning upon whether the amendment to Section 3226 of the Revised Statutes made by Section 1014 of the Revenue Act of 1924 was retroactive) is involved in *Arthur C. Harvey Co.* v. *John F. Malley and/or Malcolm E. Nichols, Former Collectors,* No. 537, October Term, 1932, now pending after argument.

2. The question as to the right of the petitioner to amend its claim for refund after expiration of the statute of limitations is raised by this record on demurrer. The original claim for refund was attached to the complaint in the District Court, but the amendments were not set forth. The complaint, however, alleged that detailed statements constituting amendments to the claim were filed. (R. 4.) In view of the recent decisions of this Court in *United States* v. *Factors & Finance Co.*, No. 141, October Term, 1932, and *United States* v. *Memphis Oil Co.*, No. 308, October Term, 1932, both decided January 9, 1933, while we contend that a claim for refund based upon specific items may not be amended after the expiration of the period of limitation so as to claim different items, we believe that question is not properly presented by this record because the allegations in the complaint appear to be sufficient on demurrer, at least with respect to the items of invested capital, and that the demurrer should therefore have been overruled. Until the allegations have been supported by proof, it is impossible to ascertain whether under the decisions of this Court in the *Factors & Finance Co.* and *Memphis Oil Co. cases* the taxpayer is entitled to recover, and, if so, how much.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

MARCH, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

No. 675

In the Supreme Court of the United States

OCTOBER TERM, 1932

GEORGE MOORE ICE CREAM COMPANY, INC.,
PETITIONER

v.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Revenue Act of 1926, ch. 27, 44 Stat. 9, 116:	
Sec. 1113 (U.S.C., App., Title 26, Sec. 156)	8
Revenue Act of 1932, ch. 209, 47 Stat. 169, 286:	
Sec. 1103 (a) (U.S.C., Sup. VI, Title 26, Sec. 1672)	8, 18
Sec. 1103 (b) (U.S.C., Sup. VI, Title 26, Sec. 26, c. 24, footnote 9)	8
Revised Statutes:	
Sec. 989 (U.S.C., Title 28, Sec. 842)	12, 14
Sec. 3220 (U.S.C., Title 26, Sec. 149)	14
Sec. 3226 (U.S.C., Title 26, Sec. 156)	8, 27, 28
Regulations:	
Treasury Regulations No. 65, Art. 1351	17
Treasury Regulations No. 69, Art. 1351	17
Miscellaneous:	
Hearings, Senate, Comm. on Finance, 68th Cong., 1st Sess., H.R. 6715	16
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Senate Report, No. 398, 68th Cong., 1st Sess	16

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 675

GEORGE MOORE ICE CREAM COMPANY, INC., petitioner

v.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR the District of Georgia

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 13–17) is not reported. The opinion of the Circuit Court of Appeals (R. 22–27) is reported in 61 F. (2d) 605.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 9, 1932 (R. 27). A petition for rehearing was denied December 20, 1932 (R. 29). Petition for a writ of certiorari was filed February 9, 1933, and granted March 20, 1933

(R. 29). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether income taxes paid voluntarily prior to the amendment of Section 3226 of the Revised Statutes by Section 1014(a) of the Revenue Act of 1924 may be recovered in a suit brought after such amendment against the Collector to whom the taxes were paid.

A further question, discussed in Point II, *infra*, is whether the amendment of the claim for refund was valid.

STATUTES INVOLVED

These are set forth in the Appendix, pp. 27–28, *infra*.

STATEMENT

On March 28, 1931, the petitioner, a Georgia corporation, brought suit in the District Court against the respondent, a Collector of Internal Revenue, to recover the principal sum of $4,551.01, being part of an amount of $6,871.18 assessed against the petitioner in November, 1921 as a deficiency in its income and profits taxes for 1917 (R. 1–5).

The petitioner's amended petition in the District Court alleged that on April 1, 1918, it filed its income-tax return for 1917, said return disclosing no tax liability (R. 2); that thereafter the Commissioner of Internal Revenue audited the return and determined that petitioner had a taxable net in-

come of $16,040.18 for 1917, that its average invested capital for 1917 was $28,416.30, and that its tax liability for 1917 was $6,871.18 (R. 2); that on November 5, 1923, petitioner paid to the respondent "upon compulsion and duress" the sum of $6,874 (R. 2–3); that the collection of said sum of $6,874 was illegal for the reason that it "was computed upon an incorrect income and invested capital"; that petitoner's correct taxable income for 1917 was $9,546.35; that its correct average invested capital for 1917 was $27,823.40, and that its correct tax liability for 1917 was $2,322.99; that petitioner is lawfully entitled to a refund of $4,551.01 (R. 4).

The amended petition further alleged that on November 5, 1927, petitioner filed a claim for refund (R. 3). A copy of this claim was attached to the amended petition (Exh. A; R. 5–11). The claim was predicated upon (1) an alleged error of the Commissioner in computing "the variable deduction for excess profits" (R. 8–9), (2) a claim for special assessment (R. 9–10), and (3) "Apparent Errors in Adjustments in Invested Capital * * * and in Net Income for 1917" (R. 10–11). Under this last heading the claim alleged that the agent was in error in eliminating certain specified items from petitioner's invested capital, "and that these amounts should be restored to Invested Capital, an audit is now being made of taxpayers' books to determine the correctness of these adjustments as well as the adjustments made in

Net Income for the year 1917. * * * If the audit now being made reflects a difference result it will be submitted as additional evidence" (R. 10–11).

The amended petition further alleged that on November 13, 1928, and January 2, 1929, detailed statements showing all the items entering into and making up net income and invested capital were filed with the Commissioner, said statements being under oath and intended as amendments to the claim [1]; that the Commissioner accepted the claim without objecting to it as insufficient in form; that said claim, together with the supplemental data above mentioned, was referred by the Commissioner to the Internal Revenue Agent in Charge at Atlanta, who, after examination, determined that petitioner was entitled to a refund of $4,551.01, said refund being based upon a corrected tax liability of $2,322.98; and that thereafter, on September 18, 1929, the Commissioner rejected the claim for refund in full (R. 3).

It would appear from the opinion of the District Court (R. 15), *but not from the record otherwise,* that the amended petition was further amended so as, apparently, to show that by the amendments of January 2, 1929, to the claim for refund several specified items were listed as having been erroneously included by the Commissioner in petitioner's net income for 1917.

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[1] The amendments to the claim referred to in the amended petition are not in the record; but see R. 19–20.

To the amended petition the Collector demurred, generally and specially [2] (R. 11–13). The District Court did not pass upon the special demurrers but sustained the general demurrer on two grounds: (1) that the tax was paid without protest, and (2) that the amended petition was based upon a ground not specified in the claim for refund, that such ground was not an amendment of the claim for refund but was an original claim, and as such was filed too late (R. 13–17). Upon appeal the Circuit Court of Appeals seems to have been of the view that the tax was not recoverable because it was not paid under protest (R. 25), but it did not decide this question, and sustained the judgment of the District Court on the ground that the amended petition was based upon a ground "wholly different from the one stated in his [the] claim for refund" (R. 22–27).

SUMMARY OF ARGUMENT

The petitioner concedes that its amended petition states no cause of action against the respondent unless Section 1014(a) of the Revenue Act of 1924, which amended Section 3226, R.S., so as to provide that suit for the recovery of a tax illegally collected might be maintained "whether or not such tax * * * has been paid under protest

[2] The demurrer (R. 11–13) was apparently filed prior to the "amendment" to the amended petition which appears only in the opinion of the District Court (R. 15).

or duress ", applies retroactively to taxes paid and transactions completed prior to its effective date. Section 1014(a) is not specifically made applicable to taxes paid prior to its enactment, and such a construction of the section is not necessarily implied. This Court has repeatedly held that a statute shall not be given a retroactive application unless such effect is required by explicit language or necessary implication. Particularly is this true where to give a statute retroactive application would injuriously affect substantive rights or rights of action previously vested. Moreover, a retroactive application of Section 1014 would give rise to serious doubts as to its constitutionality since, so construed, its effect would be to impose a personal liability upon the respondent for an act which gave rise to no liability at the time of the act.

ARGUMENT

I

THE TAX SUED FOR CANNOT BE RECOVERED SINCE IT WAS PAID VOLUNTARILY PRIOR TO THE ENACTMENT OF THE REVENUE ACT OF 1924

The tax in question was paid voluntarily and without protest on November 5, 1923[3] (R. 3). Prior to the enactment of the Revenue Act of 1924 it was the settled rule that there could be no re-

[3] While the petitioner's amended petition in the District Court alleged that the tax was paid "upon compulsion and duress" (R. 3), this allegation has apparently been

covery of a tax erroneously paid or illegally exacted unless it had been paid under protest. This was true whether the suit was against the United States[4] or against a Collector. *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488; *Chesebrough* v. *United States*, 192 U.S. 253; *Swift Co.* v. *United States*, 111 U.S. 22; *Wright* v. *Blakeslee*, 101 U.S. 174, 179; *Philadelphia* v. *Collector*, 5 Wall. 720, 731–732; *Elliott* v. *Swartwout*, 10 Pet. 137, 152–153; *Fox* v. *Edwards*, 287 Fed. 669 (C.C.A. 2d); *Coffey* v. *Exchange Bank*, 296 Fed. 807 (C.C.A. 8th); *John B. Semple & Co.* v. *Lewellyn*, 1 F. (2d) 745, 748 (W.D. Pa.), affirmed, 10 F. (2d) 1023 (C.C.A. 3d); *White* v. *Hopkins*, 51 F. (2d) 159, 161 (C.C.A. 5th). Cf. *United States* v. *P. Lorillard Co.*, 267 U.S. 471, 474; *Atchison, T. & S.F.R. Co.* v. *O'Connor*, 223 U.S. 280.

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treated by the parties as being a mere conclusion of law and not as establishing that the payment was under protest. See *United States* v. *Cuba Mail S.S. Co.*, 200 U.S. 488, 494; *Little* v. *Bowers*, 134 U.S. 547, 555. The petitioner concedes in its petition for certiorari (p. 9) and apparently in its brief on the merits (pp. 4–5) that prior to the enactment of the Revenue Act of 1924 it would not have had a cause of action against the Collector. Cf. *Burnet* v. *Chicago Railway Equipment Company*, 282 U.S. 295, 303. Both courts below proceeded upon the assumption that the tax was paid voluntarily (R. 15–16; 25–26).

[4] Except, of course, where *by statute* recovery against the United States has been permitted without the necessity of protest. See *United States* v. *Hvoslef*, 237 U.S. 1, 12; *Rand* v. *United States*, 249 U.S. 503, 508; *Fox* v. *Edwards*, 287 Fed. 669 (C.C.A. 2d); *Coffey* v. *Exchange Bank*, 296 Fed. 807, 809, 811 (C.C.A. 8th). And cf. *Hyatt Roller Bearing Company* v. *United States*, 43 F. (2d) 1008 (C.Cls.).

In 1924 Section 3226 of the Revised Statutes, which sets forth the requisites for a suit or proceeding in a court to recover taxes illegally assessed or collected, was amended by Section 1014(a) of the Revenue Act of 1924, ch. 234, 43 Stat. 253, p. 28, *infra,* by the insertion of the following proviso:

> but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

Section 1014(a) of the 1924 Act was reenacted as Section 1113 of the Revenue Act of 1926, ch. 27, 44 Stat. 9, and is still in force.[5] (U.S.C.App., Title 26, Sec. 156.)

The petitioner concedes that (Pet. p. 9)

> Without the amendment to Section 3226 R.S. * * * eliminating the necessity for protest, petitioner would not have had a cause of action against the defendant [respondent]

but asserts that

> Congress had the power to create a cause of action which had not existed before

and contends that such a right of action was created by Section 1014(a) of the Revenue Act of 1924. The asserted basis for this contention is, of course,

[5] Section 3226, R.S., was further amended by Section 1103(a) of the Revenue Act of 1932, ch. 209, 47 Stat. 286 (U.S.C., Sup. VI, Title 26, Sec. 1672), but Section 1103(b) of that Act provided that suits instituted prior to the effective date of the Act should not be affected by Section 1103(a).

that Section 1014(a) was intended to apply retroactively to taxes paid prior to its enactment. The respondent contends that Section 1014(a) was intended to apply prospectively only, and that it did not create any new causes of action predicated upon transactions which had been fully completed prior to its effective date.

The plain effect of the proviso added to Section 3226, R.S., by Section 1014(a) is to authorize a suit in court (apparently against either the United States or a Collector) to recover a tax illegally exacted, even though the tax was paid voluntarily. The proviso is not specifically made applicable to taxes paid prior to its enactment (cf. the Act of March 4, 1907, c. 2919, 34 Stat. 1371, 1373; *United States* v. *Hvoslef*, 237 U.S. 1, 9), and, in our opinion, it does not appear by necessary implication that the proviso was intended to be so applicable. It has been repeatedly held that a statute shall not be given a retroactive effect unless such construction is required by explicit language or by necessary implication. *Blodgett* v. *Holden*, 275 U.S. 142, 148; *United States* v. *St. Louis, S.F. & T. Ry. Co.*, 270 U.S. 1, 3; *Lewellyn* v. *Frick*, 268 U.S. 238, 251–252; *Fullerton Co.* v. *Northern Pacific*, 266 U.S. 435, 437; *Schwab* v. *Doyle*, 258 U.S. 529, 534; *Union Pacific Railroad Co.* v. *Laramie Stock Yards*, 231 U.S. 190, 199; *United States* v. *Burr*, 159 U.S. 78, 82–83; *Sohn* v. *Waterson*, 17 Wall. 596, 598–599; *United States* v. *Heth*, 3 Cranch, 398, 413. Particularly is

this true where to give a statute retroactive application would injuriously affect substantive rights or rights of action previously vested. *Winfree* v. *Northern Pacific Ry. Co.*, 227 U.S. 296, 302; *U.S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 314–315; *Chew Heong* v. *United States*, 112 U.S. 536, 539; *Twenty Per Cent Cases*, 20 Wall. 179, 187. In the last case cited, a decision frequently referred to with approval by this Court, the Court said (p. 187):

> Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, *unless the language employed expresses a contrary intention in unequivocal terms.* (Italics ours.)

The application of this rule of construction to the instant case is illustrated by *U.S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, *supra*. That case involved the Act of August 13, 1894, c. 280, 28 Stat. 278, which authorized a person supplying labor and materials to a Government contractor to maintain suit in the name of the United States for his own use upon the contractor's bond. The Act of February 24, 1905, c. 778, 33 Stat. 811, amended the former statute by establishing restrictions as to the district in which such action might be brought and by creating limitations as to the time before which and within which such action might be

brought. In holding that the amendatory statute was limited not only to suits begun after its effective date but also to *transactions occurring after its effective date,* this Court said (p. 314):

> The presumption is very strong that a statute was not meant to act retrospectively, *and it ought never to receive such a construction if it is susceptible of any other.* It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. (Italics ours.)

After pointing out that the amending statute affected substantive rights, by postponing and limiting a right of action which already vested, the Court further said (p. 315):

> we are convinced that Congress did not intend that the amendment should apply to cases where the bond had already been executed, the work done, the respective rights of the parties settled, and the cause of action already in existence. If Congress had intended otherwise, we think it would have still further amended the original act *by providing in plain language that the amendment should apply to all cases,* and not be confined to the future. (Italics ours.)

The conclusion that Section 1014(a) was intended to apply only to taxes paid after its enactment is sustained, if not required, by the fact that a re-

troactive application of the statute would give rise to serious doubts as to its constitutionality. An action against a Collector to recover taxes illegally collected by him is a personal one, and in the absence of a certificate of probable cause (Section 989, R.S. as amended; U.S.C., Title 28, Sec. 842) personal execution may issue against him. *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 430; *Union Trust Co.* v. *Wardell*, 258 U.S. 537; *Smietanka* v. *Indiana Steel Co.*, 257 U.S. 1; *Sage* v. *United States*, 250 U.S. 33; *Patton* v. *Brady, Executrix*, 184 U.S. 608. Cf. *Bankers Coal Co.* v. *Burnet*, 287 U.S. 308, 311–312. It is conceded (Pet. p. 9) that prior to the amendment of Section 3226, R.S., in 1924 no cause of action existed against the respondent by reason of the facts set forth in petitioner's amended petition.[6] (See cases cited at p. 7, *supra*.) Accordingly, if the 1924 amendment be given a retroactive application its effect will be

[6]Although conceding in its petition for certiorari (p. 9) that prior to the Revenue Act of 1924 it "would not have had a cause of action against the defendant [respondent]", and in its brief on the merits (p. 10) that where "protest is a condition precedent to recovery it must be alleged and proved and that it is not an affirmative defense to be pled by the defendant", petitioner contends (Br. p. 16) that the rule "making protest a condition precedent to the recovery * * * did not go to the question of the existence of the liability." These assertions are quite inconsistent. It is now too late to contend, in effect, that protest is an affirmative defense and that recovery may be had if the Collector does not raise the defense. See *Chesebrough* v. *United States*, 192 U.S. 253, *supra*.

to impose a personal liability upon the respondent for an act which gave rise to no liability at the time thereof.[7] We think it extremely doubtful if within constitutional limitations Congress could retroactively create such a liability. See *Graham & Foster v. Goodcell*, 282 U.S. 409, 426, 429, *supra*; *Coolidge* v. *Long*, 282 U.S. 582; *Untermyer* v. *Anderson*, 276 U.S. 440; *Blodgett* v. *Holden*, 275 U.S. 142; *Nichols* v. *Coolidge*, 274 U.S. 531; *Forbes Boat Line v. Board of Commissioners*, 258 U.S. 338, 339. See also *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 407–410; *Carpenter* v. *Shaw*, 280 U.S. 363; *Choate* v. *Trapp*, 224 U.S. 665; *Barnitz* v. *Beverly*, 163 U.S. 118; *Pritchard* v. *Norton*, 106 U.S. 124, 132. In the *Graham & Foster case, supra*, this Court held that where an asserted vested right arose from the mistake of Government officers in administering the law, Congress was not prevented from curing the defect in administration merely because the effect of such action might be to destroy causes of action which might otherwise exist, but the Court specifically distinguished the situation there before the Court from "a case of an attempt retroactively

[7] In *Arthur C. Harvey Co.* v. *John F. Malley and/or Malcolm E. Nichols*, Former Collectors, No. 537, present term, decided March 13, 1933, which involved, among others, the question here presented, the Collector from whom the taxpayer sought recovery in a suit brought in 1930 had long been out of office, and the transactions for which the taxpayer insisted the Collector was liable had occurred several years prior to the 1924 amendment.

to create a liability in relation to a transaction as to which no liability had previously attached" (282 U.S. 409, 426).

It may be suggested that the respondent is an official of the Government, and that even though Congress may not retroactively impose liabilities upon persons generally, it may retroactively impose a liability upon a Collector, who is, generally speaking, reimbursed by the Government for personal liabilities incurred in the performance of official duties. (See Section 989, R.S., as amended, U.S.C., Title 28, Sec. 842; Section 3220, R.S., as amended, U.S.C., Title 26, Sec. 149.) But as this Court pointed out in the *Smietanka case,* 257 U.S. 1, 4, 5, *supra,* "A personal execution is denied only when the certificate [of probable cause] is given", and when a suit against a Collector "is begun it cannot be known with certainty that the judgment will be paid out of the Treasury."

But for the purposes of the instant case it is not necessary to seek a final, authoritative answer to the question whether Congress might constitutionally make Section 1014 of the Revenue Act of 1924 applicable to transactions completed prior to its enactment. The authorities above cited establish, in our opinion, that such an attempt would give rise to a serious constitutional question. This Court has repeatedly said that where a statute is susceptible of two constructions, the Court will adopt that construction by which serious consti-

tutional questions are avoided.[8] *Blodgett* v. *Holden*, 275 U.S. 142, 148, *supra*; *Lewellyn* v. *Frick*, 268 U.S. 238, 251, *supra*; *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 390; *Bratton* v. *Chandler*, 260 U.S. 110, 114; *Texas* v. *Eastern Texas R.R. Co.*, 258 U.S. 204, 217; *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407, 408.

The contention that Section 1014(a) was intended to apply prospectively only is not inconsistent with its legislative history. The Report of the House Committee on Ways and Means contains the following explanation of that section (House Report No. 179, 68th Cong., 1st Sess., pp. 33–34):

> The provisions of section 1318 of the existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums or penalties paid, that such amounts shall have been paid under protest or duress. The fact that pro-

[8] Section 3226, R.S., as amended by Section 1014, is, of course, applicable to suits against the United States. In construing such section, this Court has pointed out that "suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued", and that Section 3226, R.S., as amended, is subject "to the rule of strict construction to be applied to waivers by the United States of its sovereign immunity from suit." *United States* v. *Michel*, 282 U.S. 656, 659, 660. This doctrine of construction would seem to be equally applicable to a suit against a Collector since clearly Congress intended that the statute should apply in the same manner with respect both to suits against the United States and suits against Collectors.

> test was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well-advised taxpayers are concerned, and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed.[9]

We think that in substance the Committee Report repeats the language of the statute and that it offers no light as to the legislative intent which may not be gleaned from the statute itself.[10] Moreover, even if the words of the Report "are broad enough in their literal extent to comprehend existing cases", nevertheless such words "must * * * be construed as applicable only to cases that might hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." *Twenty Per Cent. Cases*, 20 Wall. 179, 187, *supra*.

The petitioner places reliance upon Section 1014(b) of the Revenue Act of 1924, p. 28, *infra*, which provides that

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[9] Precisely the same statement with respect to Section 1014 [then Section 1114] is found in the Report of the Senate Committee on Finance (Senate Report No. 398, 68th Cong., 1st Sess., pp. 44–45).

[10] The only comment with respect to Section 1014 which seems to have been made at the Committee Hearings (Hearings before the Senate Committee on Finance, 68th Cong., 1st Sess., H.R. 6715, p. 52) is the following statement of A. W. Gregg, Special Assistant to the Secretary of the Treasury:

"Turning now to section 3226 of the Revised Statutes, on page 323, there is only one change and it is in lines 14, 15,

> This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

But, under the applicable rules of statutory construction, a declaration that the statute shall not affect pending court proceedings does not necessarily imply that the statute shall affect all future court proceedings wholly without regard to whether the taxes in question were paid prior to the enactment of the statute. Moreover, Section 1014(b) must be read in the light of the statute which it replaced, i.e., the second paragraph of Section 1318 of the Revenue Act of 1921, ch. 146, 42 Stat. 227, which reads as follows (p. 27, *infra*)

> This section [Section 3226, R.S., as amended] shall not affect any suit or pro-

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and 16. The result of the change is this: Under the existing law it is probable, although the courts have not finally passed upon it, that a suit for the recovery of an excessive tax paid can be maintained only if the tax was paid under protest. The result of that is that those taxpayers who are well advised and who pay every cent of their taxes under protest, as most of them do now, can sue to recover it back; but the individual taxpayer, who is not so well advised, reads the regulations, and pays his tax accordingly, cannot bring suit for recovery because of his failure to pay under protest. The matter of paying under protest has nothing to do with the merits of the case, and the Treasury recommends that it be changed."

There is nothing in this comment which indicates that the amendment was to apply to taxes paid prior to the effective date of the statute.

The applicable regulations merely repeat the language of the statute. Treasury Regulations No. 65, Art. 1351; Treasury Regulations No. 69, Art. 1351.

> ceeding instituted prior to the passage of this Act, *but shall apply to all suits and proceedings instituted after the passage of this Act,* whether or not barred by prior Acts of Congress. (Italics ours.)

It thus appears that, in Section 1014 of the 1924 Act, Congress failed to insert the provision of Section 1318 of the 1921 Act by which Section 3226, R.S., as amended, was specifically made applicable to all suits thereafter instituted.[11] This omission would seem to indicate a conscious effort on the part of Congress to limit the effect of the 1924 amendment to taxes paid thereafter.

Pursuant to the principles upon which we rely, it was held in *Warner* v. *Walsh,* 27 F. (2d) 952 (D.Conn.), that the 1924 amendment of Section 3226, R.S., was prospective only, and that it was limited not only to suits begun after its passage but also to suits begun as a result of transactions arising after its passage and to payments for taxes collected thereafter. The same result was reached in *Du Puy* v. *United States,* 67 C.Cls. 348, 381–382. See also *Rasmussen* v. *Brownfield-Canty Carpet Co.,* 31 F. (2d) 89, 92 (C.C.A. 9th); *Harrison* v. *Lewellyn,* 28 F. (2d) 990 (W.D.Pa.), aff'd, 35 F. (2d)

[11] Attention is called also to Section 1103 of the Revenue Act of 1932, ch. 209, 47 Stat. 286, which further amended Section 3226, R.S. Like Section 1318 of the 1921 Act, Section 1103(b) of the 1932 Act contained *specific provisions* making Section 3226, R.S., as amended, inapplicable to all pending suits *and applicable to all suits thereafter instituted.*

283. Cf. *Clift & Goodrich* v. *United States,* 56 F. (2d) 751, 753 (C.C.A. 2d), certiorari denied October 10, 1932, No. 162, October Term, 1932; *Winant* v. *Gardner,* 29 F. (2d) 836 (C.C.A. 2d).

On the other hand, certain courts have held or intimated that the 1924 amendment should be given a retroactive application. *Farmers Loan & Trust Co.* v. *United States,* 64 C.Cls. 516; *Beatty* v. *Heiner,* 10 F. (2d) 390, 392 (W.D.Pa.), reversed on other grounds, 17 F. (2d) 743, 276 U.S. 598. See also *Leach v. Nichols,* 42 F. (2d) 918, 921 (D.Mass.), reversed on other grounds, 50 F. (2d) 787 (C.C.A. 1st), 285 U.S. 165; *Weir* v. *McGrath,* 52 F. (2d) 201 (S.D. Ohio), affirmed without opinion, 41 F. (2d) 1021 (C.C.A. 6th); *Electric Storage Battery Co.* v. *McCaughn,* 52 F. (2d) 205 (E.D.Pa.); *Warner* v. *Walsh,* 24 F. (2d) 449 (D.Conn.). In none of these cases, except possibly *Weir* v. *McGrath,* does the question seem to have been given careful consideration, and in our opinion these decisions may not be supported. In *Warner* v. *Walsh,* 27 F. (2d) 952, *supra,* the court in a carefully considered opinion refused to follow either *Beatty* v. *Heiner, supra,* or its own earlier decision in *Warner* v. *Walsh,* 24 F. (2d) 449, *supra.* The *Farmers Loan & Trust Co. case, supra,* has been overruled by the later decision of the Court of Claims in *Du Puy* v. *United States,* 67 C.Cls. 348, 381–382, *supra.*[12]

[12] It should be noted that in the *Farmers Loan and Trust Co. case, supra,* the suit was against the United States. It

II

WHETHER THE AMENDMENT OF THE CLAIM FOR REFUND WAS VALID

The District Court sustained respondent's demurrer to the amended petition not only on the ground that the tax was paid voluntarily but also on the ground that the amended petition sought recovery of the tax on a ground which was not specified in the claim for refund (R. 13–17). The Circuit Court of Appeals did not pass on the first of these grounds but sustained the judgment of the District Court on the second ground (R. 22–27).

The petitioner here concedes that the original claim for refund was insufficient but contends that it was made sufficient by amendment prior to its rejection. Petitioner recognizes that the amendment was made after the expiration of the statutory period for filing a claim for refund, but asserts that such amendment was permissible under the decisions of this Court in *United States* v. *Factors & Finance Co.* and *United States* v. *Memphis Oil Co.*, respectively, Nos. 141 and 308, present term, decided January 9, 1933.

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is arguable that Congress might validly surrender a defense theretofore available to the Government, but for reasons above set forth it is extremely doubtful if within constitutional limitations it could retroactively impose a personal liability upon a Collector for an act which gave rise to no liability at the time of the act.

In the respondent's memorandum filed in response to the petition for certiorari, it was stated (p. 2):

> while we contend that a claim for refund based upon specific items may not be amended after the expiration of the period of limitation so as to claim different items, we believe that question is not properly presented by this record because the allegations in the complaint appear to be sufficient on demurrer, at least with respect to the items of invested capital, and that the demurrer should therefore have been overruled.

In view of this statement we think the petitioner may have assumed, in preparing its brief on the merits, that the Government intended to make no point before this Court as to the sufficiency of the claim for refund or as to the validity of the amendment of the claim for refund.[13] Further consideration of the record, however, raises doubts as to the correctness of the concession made in the respondent's memorandum, and for the protection of the Government's interest in possible further proceedings in this case and in other cases which may arise we desire briefly to set forth our views with respect to the validity of the amendment of the claim for refund.

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[13] Although petitioner seems to have argued the point, it has done so quite briefly.

The amended petition alleged that the collection of the sum of $6,874.00 as petitioner's tax for 1917 was illegal for the reason that said tax (R. 4)—

> was computed upon an incorrect income and invested capital, in that the tax was computed upon a taxable net income of $16,940.18 and an average invested capital for the year 1917 of $28,416.30

whereas

> for the taxable year 1917, the correct taxable net income is $9,546.35; the correct average invested capital is $27,823.40, and the correct tax liability is $2,322.99.

Since it thus appears on the face of the amended petition that the correct invested capital was *less* than the invested capital used by the Commissioner in computing the alleged erroneous tax, it is obvious that the amended petition does not seek, and presents no basis for, recovery of the tax on the ground of errors of the Commissioner in fixing petitioner's invested capital.[14] The amended petition would thus seem to be insufficient upon demurrer, so far as it rests upon alleged errors with respect to invested capital.

The only other basis of recovery set forth in the amended petition is alleged errors of the Commissioner with respect to the petitioner's net income.

[14] The lower the invested capital is fixed the higher is the tax. While apparently the Commissioner did make an error with respect to petitioner's invested capital, it appears on the

The original claim for refund, attached to the amended petition (R. 5–11) was filed on the last day of the four-year statutory period (R. 3). This claim contained three specific grounds or bases for refund (i.e., error with respect to the variable deduction for excess profits (R. 8–9); claim for special assessment (R. 9–10); and errors with respect to invested capital (R. 10–11))—none of which grounds are or may be now relied upon—and a general claim of errors with respect to net income [15] (R. 10–11). This general claim relied on no specific adjustments in net income but stated that an audit was being made, and that if the audit showed differences in net income it would be submitted as additional evidence (R. 11).

The general claim for refund based upon alleged errors with respect to net income was obviously insufficient because of the failure to set forth the specific adjustments relied upon. *United States* v. *Felt and Tarrant Co.*, 283 U.S. 269. It is true that subsequently the claim for refund was amended so as, we now assume, to show such specific adjustments, but the amendment was made after expiration of the statutory period for filing a claim for refund.

---

face of the amended petition that this error was in petitioner's favor.

[15] For the purpose of this brief we assume that the claim for refund, properly interpreted, presents a general claim of errors with respect to net income.

The demurrer to the amended petition would thus seem to present the question whether a claim for refund containing several specific items, all of which are abandoned, and a general item may, after expiration of the statutory period for filing claim for refund, be amended so as to present an additional specific item or basis of recovery. We question whether such amendment may lawfully be made under the decisions of this Court in the *Memphis Oil Co.* and *Factors & Finance Co. cases, supra.* In both of those cases the original claim was general, specifying no particular ground, and it was held that the claim was broad enough to include a subsequent specific amendment filed by the taxpayer. But this does not mean that a claim stating one or more specific grounds may be amended to state another specific ground after the statute has expired. In *United States* v. *Henry Prentiss & Co.,* No. 234, October Term, 1932, decided January 9, 1933, this Court said:

> A declaration according to the common count for money had and received may be good though it does not tell us how the money was received or the use established. * * * This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure.

The distinction is not merely formal. When the claim originally filed is general, the Commissioner has his remedy. He may reject the claim for refund for its deficiencies in form. If he does not do so, he may well be held to have waived the defects and be required to consider any amendment, within the scope of the original claim, filed before he has rejected it. But where the original claim contains specific grounds, the Commissioner may not summarily reject it for a defect of form; there is no defect of form. He must consider the specific claims made by the taxpayer; his consideration frequently requires an investigation; and such an investigation often takes a considerable amount of time. If it be held that the taxpayer may add new grounds at any time until final action on the original claim, it is obvious that the statutory period fixed by Congress has been greatly extended. This is illustrated by the present case; for the grounds upon which the taxpayer now relies were not presented to the Commissioner until more than a year after November 5, 1927, when the four-year period fixed by Congress for the filing of claims for refund had expired.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APRIL, 1933.

APPENDIX

STATUTES INVOLVED

REVENUE ACT OF 1921, CH. 136, 42 STAT. 227, 314

SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

This section shall not affect any suit or proceeding instituted prior to the passage of this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress (U.S.C., Title 26, Sec. 156).

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; *but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.* No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U.S.C., Title 26, Sec. 156.)

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

(NOTE: Italics supplied, indicating amendment pertinent to this case.)

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APR 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

NO. 675

GEORGE MOORE ICE CREAM COMPANY, *Petitioner,*

v.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May it please the Court:

The undersigned respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

JOHN G. BUCHANAN,
PAUL G. RODEWALD,
Amici Curiae.

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GEORGE MOORE ICE CREAM COMPANY, *Petitioner,*

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BRIEF OF AMICI CURIAE.

This case turns on whether the amendment of Section 3226 of the Revised Statutes (U. S. C. A., Title 26, Section 156) made by Section 1014 of the Revenue Act of 1924, 43 Stat. 343, is applicable to suits thereafter brought to recover taxes paid without protest or duress before the passage of that Act. Among the suits against Collectors or against the United States which will be affected by the decision in this case is the suit of our client, and this brief is accordingly submitted, with the consent of counsel, in support of the position that the suit in the case at bar was maintainable without alleging or proving payment of the tax under protest or duress.

The Question Presented.

Whether a suit brought March 28, 1931, to recover an internal-revenue tax may be maintained against a Collector of Internal Revenue who collected the tax prior to June 2, 1924, the effective date of the Revenue Act of 1924, without alleging or proving that the tax was paid under protest or duress.

Summary of Argument.

Section 3226 R. S., as amended by Section 1014, Revenue Act of 1924 (43 Stat. 343), reenacted without change by Section 1113 (a), Revenue Act of 1926 (44 Stat. 9), permits this suit to be maintained although the tax was not paid under protest or duress. The construction of this section contended for by the Government, as not applying to taxes paid prior to the enactment of the Revenue Act of 1924, is contrary to the great weight of authority and to the plain intent of Congress. It is a construction of a tax statute in a manner which is illiberal to all taxpayers. It applies a procedural statute so as to perpetuate the evil intended to be cured. It is based on considerations of supposed rights of Collectors which are insubstantial or nonexistent. Congress having left these supposed rights out of account in other important respects, it did not intend them to be taken into account in this respect.

Argument.

SECTION 3226 R. S. AS AMENDED PERMITS THIS SUIT TO BE MAINTAINED ALTHOUGH THE TAX WAS NOT PAID UNDER PROTEST OR DURESS.

It is significant that the payment on November 5, 1923, of the tax involved in this suit (R. 3) is the only event material to the action or mentioned in Section 3226 R. S. which took place prior to the enactment of the Revenue Act of 1924. The claim for refund was filed November 7, 1927, and was rejected September 8, 1929 (R. 5.) The amended petition was filed March 28, 1931, and does not allege payment under protest (R. 6). The Circuit Court of Appeals suggests, but does not decide, that because the tax was not so paid, the plaintiff may not recover, although Section 3226 R. S. as reenacted by Section 1113 (a), Revenue Act of 1926, provides that a suit for the recovery of an internal revenue tax may be maintained "whether or not such tax, penalty or sum has been paid under protest or duress". The reason given is that the tax was paid before June 2, 1924, the date of the amendment introducing the language quoted into Section 3226 R. S., and that that section as thus amended therefore does not apply. This conclusion is contrary to the great weight of authority.

It has not been doubted by the textwriters that Section 3226 R. S. as amended obviates the necessity for payment under protest or duress of any tax the suit to recover which is brought after the enactment of the Revenue Act of 1924.[1] *Montgomery, Income Tax Pro-*

---

(1) Montgomery, op. cit., says, at p. 395:

"Under the present section, as now amended, suits instituted subsequent to June 2, 1924 (the date of approval of the 1924 law), may now be maintained, whether or not the tax, penalty or sum has been paid under protest or duress."

cedure (1925), pp. 352, 395; *Klein, Federal Income Taxation* (1929), p. 1648. Holmes (*Federal Taxes,* 6th ed., 1925) says (pp. 1533-1534):

> "The present law specifically provides that in the case of all suits commenced subsequent to the enactment of the 1924 act, taxes may be recovered whether or not they were paid under protest or duress. As to taxpayers who prior to the enactment of the present law filed suits to recover taxes paid without protest and under no duress the necessity of protest and duress as a prerequisite to suit is still an open question. This discrimination has to a considerable extent been avoided by the action of the Court of Claims in permitting taxpayers to discontinue actions commenced prior to the enactment of the present law and to commence new actions."

Not only the contemporary textwriters and the Court of Claims but apparently the Commissioner of Internal Revenue and the Secretary of the Treasury are

---

At p. 352 the learned author states:

> "In those suits which were pending on June 2, 1924, for the recovery of excess tax payments the defense of non-protest possibly still will be invoked, if appropriate. Except in those instances in which the statute of limitations has run, the defect may be cured by dismissing the present action and reinstituting suit."

These statements are repeated in later editions. (1926) Vol. 1, pp. 388 and 336 respectively; (1927) Vol. 2, pp. 366 and 106 respectively; (1929) (Federal Tax Practice), pp. 425 and 126-127 respectively. Klein, op. cit., after commenting on the burdensome character of the older rule, says (p. 1648):

> "But, fortunately, these problems are solely of historical interest. Protest is a thing of the past. The 1924 Act completely abolished the necessity of protest as a prerequisite to recovery of overpayment in actions commenced after its enactment. The sole inquiry is whether the taxpayer has overpaid his tax liability; not whether he has performed a certain ritual."

of the opinion that Section 3226 R. S. as amended applies to all actions subsequently brought. Regulations 65, Article 1351, promulgated under the Revenue Act of 1924, provides, without in any way limiting the generality of the language:

> "Payment of the tax, penalty or other sum under protest or duress is not a prerequisite to the bringing of such suit or proceeding."(2)

It must be assumed that Congress was aware of the uniform construction given by the bar and the Government to Section 3226 R. S. as amended by the 1924 Act. The reenactment without change, by Section 1113, Revenue Act of 1926, of Section 3226 R. S. as thus amended indicates that Congress was content with that construction. It significantly left the law in that form. *National Lead Company v. United States,* 252 U. S. 140, 146 (1920, Clarke, J.); *United States v. Farrar,* 281 U. S. 624, 634 (1930, Sutherland, J.); *Old Colony R. Co. v. Commissioner,* 284 U. S. 552, 557 (1932, Roberts, J.).

In view of the general opinion of the officers of the Government that in suits brought after June 2, 1924, it was not necessary to show payment of the tax under protest or duress, it is not to be doubted that many judgments were recovered both against Collectors and against the United States which should not have been recovered if the position of the Government in the case at bar is sound. The history of those few decisions in which the point was raised during the period of more

(2) This language is repeated in Reg. 69, Art. 1351, promulgated under the Revenue Act of 1926. Reg. 74, promulgated under the Revenue Act of 1928, contains no corresponding provision, Section 3226 R. S. not having been amended or reenacted by that Act. Section 3226 R. S. was again amended by Section 1103 of the Revenue Act of 1932, but in a respect not here material. Reg. 77, promulgated under that Act, contains no article corresponding to Art. 1351, Reg. 65.

than eight years which has elapsed since the amendment went into effect shows a general acquiescence by the Government in decisions against it and a growing weight of authority in favor of the taxpayer.

The point first appears in *Beatty v. Heiner,* 10 F. (2d) 390 (W. D. Pa., 1925, Schoonmaker and Thomson, D. JJ.), where it was decided in favor of the taxpayer. ~~It was not argued on appeal, on behalf of the Collector, that the decision was wrong on this point.~~ The Circuit Court of Appeals for the Third Circuit, reversing the judgment on the merits, ~~made no mention of~~ expressed no opinion on the point. *Heiner v. Beatty,* 17 F. (2d) 743 (1927, Woolley, Circ. J.). The point was not relied on before this court, which affirmed the judgment. *Beatty v. Heiner,* 276 U. S. 598 (1927, per curiam).

In *Warner v. Walsh,* 24 F. (2d) 449 (D. Conn., 1927, Thomas, D. J.), the position of the taxpayer on this point was sustained. Apparently no appeal was taken. The case had previously gone to the Circuit Court of Appeals for the Second Circuit, which, in an opinion by Circuit Judge Mack, reported at 15 F. (2d) 367 (1926), had reversed the judgment of the District Court, reported at 10 F. (2d) 155 (1926). The point as to protest and duress was not raised until the case came up in the District Court for the second time. Mrs. Warner sued the same Collector to recover taxes for later years, but the District Court, by Burrows, D. J. (27 F. (2d) 952, (1928)), gave judgment for the defendant, on the ground that Section 3226 R. S. as amended did not apply to suits to recover taxes paid prior to the enactment of the Revenue Act of 1924. The taxpayer appealed and was ultimately given her money, the Government, as we are informed, having confessed error. Undoubtedly this action was taken because of

the contrary opinion of the Circuit Court of Appeals for the Second Circuit in *Winant v. Gardner,* discussed below.

In *Winant v. Gardner,* Commerce Clearing House, Federal Tax Service, 1928, Vol. III, par. D-8118 (E. D. N. Y.), the court had rendered judgment against a taxpayer on the ground that the taxes sued for had been paid without protest. The Circuit Court of Appeals for the Second Circuit, in an opinion by Circuit Judge L. Hand, reversed the judgment on the ground that although the suit had been brought in 1923 the provision of Section 3226 R. S. as amended eliminated the requirement for proof of duress and protest. C. C. H., 1928, Vol. III, par. D-8376. Upon application for reargument, however, the court noted that subdivision (b) of the amending section made it inapplicable to pending cases. It therefore withdrew its former opinion and affirmed the judgment. *Winant v. Gardner,* 29 F. (2d) 836 (1928). The court concluded its per curiam opinion with the remark:

> "Happily such a situation can no longer arise, but we have no power to compel the defendant to concede what justice would seem to demand."

In *Farmers Loan & Trust Co. et al. v. United States,* 64 C. Cls. 516 (1928, Graham, J.), the Court of Claims held, four judges sitting, that under the applicable Acts no protest was necessary to recover 1918 taxes paid in 1922, the suit ~~evidently~~ having been brought ~~after~~ before the 1924 Act was passed. On the other hand, in *Herbert Du Puy v. United States,* 67 C. Cls. 348, 35 F. (2d) 990, 1000 (1929, Green, J.), the Court of Claims held that taxes paid in 1921 without protest could, for that reason, among others, not be recovered. On the opinion in that case, the court decided the related case of *Amy H. Du Puy v. United States,* ~~68 C. Cls. 574~~, 35 F. (2d)

990 (1929, per curiam). Certiorari was denied in both cases, 281 U. S. 739 (1930). Nevertheless, in *Hyatt Roller Bearing Co. v. United States,* 70 C. Cls. 443, 43 F. (2d) 1008 (1930, Littleton, J.), the Court of Claims held that failure to pay under protest was not a bar to suit brought ~~after~~ before June 2, 1924. On this point, the opinion is carefully reasoned and refers to *Farmers Loan & Trust Co. v. United States, supra,* but not to *Du Puy v. United States, supra.* The opinion, however, was by the entire court,* while the decisions in the *Du Puy* cases were not participated in by Judges Williams and Littleton. It is fair to state, therefore, that the later case reflects the opinion of the Court of Claims.

In *Nichols v. Leach,* 42 F. (2d) 918 (D. Mass., 1930, Brewster, D. J.), the court likewise ruled the protest and duress point in favor of the taxpayer. The decision was reversed on other grounds, the opinion making no mention of this point, which apparently was not pressed on behalf of the Collector. *Nichols v. Leach,* 50 F. (2d) 787 (1931, Wilson, Circ. J.). The opinion of this court affirming the latter decision likewise contains no reference to the point, which appears not to have been argued. *Leach v. Nichols,* 285 U. S. 165 (1932, McReynolds, J.).

In *Weir v. McGrath* and *Weir v. Dean,* 52 F. (2d) 201 (S. D. Ohio, 1928, Hickenlooper, D. J., now Circ. J.), the court carefully examined the question now raised and, we submit, fully refuted the arguments suggested below in the case at bar. The decision was adopted as authoritative by the Treasury Department, which published it as Treasury Decision 4210, Cumulative Bulletin VII-2, p. 338. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment per curiam, 41 F. (2d) 1021 (1930).

* See original opinion.

In *Electric Storage Battery Co. v. McCaughn,* 52 F. (2d) 205 (E. D. Pa., 1931, Kirkpatrick, D. J.), the court held that taxes paid prior to 1924 were recoverable, though not paid under protest or duress. The opinion refers, at page 209, to the decision of Judge West in *Willard Storage Battery Co. v. Routzahn* (Dec. 16, 1929, N. D. Ohio, unpublished). Both Collectors appealed, but neither raised the point on appeal that suit was barred because the taxes involved had not been paid under protest or duress. In the former case the judgment has been affirmed. *McCaughn v. Electric Storage Battery Co.,* C. C. H., 1933, Vol. III, par. 9098 (C. C. A., 3rd Circ., Buffington, Circ. J.). The opinion makes no reference to protest or duress. The decision of the Circuit Court of Appeals for the Sixth Circuit in the *Willard* case has not yet been rendered.

In *Clift & Goodrich, Inc. v. United States,* C. C. H., 1931, Vol. III, par. 9439 (S. D. N. Y., Knox, D. J.), the court held that suit to recover taxes paid without protest prior to the 1924 Act could not be recovered in a suit against the United States. We are informed that the point was raised by the judge without suggestion from counsel. On motion for a reargument the court, being informed of the opinion previously expressed in *Winant v. Gardner, supra,* by the Circuit Court of Appeals for the Second Circuit, withdrew the opinion mentioned and granted leave to the petitioner to file an amended petition. C. C. H., 1931, Vol. III, par. 9492. The taxpayer having subsequently elected to stand on its petition, a final judgment was rendered against it, which was affirmed by the Circuit Court of Appeals for the Second Circuit. 56 F. (2d) 751 (1932, L. Hand, Circ. J.). This court denied certiorari, 53 S. Ct. 17 (1932). The opinion of the Circuit Court of Appeals refers to Section 3226 R. S. (26 U. S. C. A., Section 156).

but holds that section to be inapplicable. This was not because the tax was paid prior to June 2, 1924, but because it was paid not by a taxpayer in discharge of his own taxes but by a volunteer in discharge of another's taxes. Such payments must still be made under protest and duress to be recoverable.[3]

In *Moses v. United States,* 61 F. (2d) 791, 794 (C. C. A., 2nd Circ., 1932, Swan, Circ. J.), the point was mentioned but assumed in favor of the taxpayers, judgment against whom was affirmed. That decision is pending before this court on application for certiorari at No. 821.

The case of *Arthur C. Harvey Co. v. Malley,* No. 537 October Term, 1932, in which this court affirmed a judgment against the taxpayer, is stated to have involved this point. Neither the District Court, however, nor the Circuit Court of Appeals appears to have entertained the question, and it was not mentioned nor passed upon by this court in affirming the judgment.

Some reliance has been placed by the Government on *Harrison v. Lewellyn,* 28 F. (2d) 910 (W. D. Pa., 1928, Gibson, D. J.), affirmed on other grounds, 35 F. (2d) 283 (C. C. A., 3rd Circ., 1929, Woolley, Circ. J.), and on *Rasmussen v. Brownfield-Canty Carpet Co.,* 31 F. (2d) 89 (C. C. A., 9th Circ., 1929, Gilbert, Circ. J.). The former case was decided by the same court which decided *Beatty v. Heiner, supra,* though by a different judge, and does not mention that decision. It appears to turn on the authority of *Semple & Co. v. Lewellyn,* 1 F. (2d) 745 (1924), decided by the same judge, hold-

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[3] Wourdack v. Becker, 55 F. (2d) 840 (C. C. A., 8th Circ., 1932; Van Valkenburgh, Circ. J.), cert. den., 284 U. S. 548 (1932); Ohio Locomotive Crane Co. v. Nauts, C. C. H., 1932, Vol. III, par. 9437 (N. D. Ohio, Hahn, D. J.).

ing that a Collector is not liable in a suit to recover taxes collected by the Commissioner by credit. The reasoning of the court assumes that a suit against the United States could have been maintained, and therefore the decision presupposes that the taxpayer in the case at bar is right. The decision in the *Rasmussen* case respecting the amount paid the Collector on January 8, 1924, and applied by him in discharge of a tax liability designated by the plaintiff is made to turn on the statute of limitations prescribed in Section 252 of the Revenue Act of 1921 (42 Stat. 227). This ground of the decision is difficult to understand, the section referred to having been repealed by Section 1100 of the Revenue Act of 1924 as of January 1, 1924. Reference was made to the fact that payment was not made under duress but was voluntary, but no consideration appears to have been given to the provisions of Section 3226 R. S. as amended.

It is therefore submitted that the decisions against the position now taken by the Government in the case at bar, coupled with the long acquiescence of its officers in those decisions, and coupled with the reenactment of Section 3226 R. S. as amended without change in the Revenue Act of 1926, should impel the court to reverse this judgment. This taxpayer and other taxpayers whose suits are still pending or not yet brought should not be subjected to the hardship of the ancient evil which Congress has declared shall no longer stand in the way of justice.

The practice of the Government of not persisting in the defense (except in occasional instances) that the tax was not paid under protest or duress in suits involving taxes paid prior to June 2, 1924, was, we submit, fully justified apart from the authorities above set out,

in view of the plain language of the provision under consideration, construed in the light of established principles. Section 3226 R. S., as reenacted by Section 1113 (a) of the Revenue Act of 1926, is a provision of general application relating to suits or proceedings for the recovery of internal revenue taxes. A construction of the section as applying to such suits or proceedings thereafter brought would be the natural construction. The precaution taken by Congress in subdivision (b) of Section 1113, Revenue Act of 1926, as in subdivision (b) of Section 1014, Revenue Act of 1924, in providing that the section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924, strongly aids this construction. In *Moses v. United States, supra,* Circuit Judge Swan expressed this opinion, saying (61 F. (2d) 791, 794):

> "Paragraph b of section 1014 expressly declared that the amendment shall not apply to pending suits. The implication is that it shall apply to all subsequent suits even though they relate to taxes paid prior to the enactment of section 1014."

The fact that Congress felt it necessary to take this precaution argues strongly that pending suits would, in its opinion, otherwise be affected. This reasoning was employed in *Brown v. Maryland,* 12 Wheat. (25 U. S.) 419 (1827, Marshall, C. J.) the court saying, at p. 428:

> "The exception was made, because the tax would otherwise have been within the prohibition. If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law giver, the thing excepted would be within the general clause, had the exception not been made, we know no reason why this general rule should not be as

applicable to the constitution as to other instruments."

If, but for subdivision (b), Section 3226 R. S. would be applicable to suits pending at the time of its amendment, *a fortiori* it is applicable to all suits thereafter brought.

This is but a particular application of the maxim *"Expressio unius est exclusio alterius"*, which this court, in *United States v. Arredondo*, 6 Pet. (31 U. S.) *691 (1832, Baldwin, J.), at p. *725, described as "a universal maxim in the construction of statutes". See also *Arthur v. Cumming*, 91 U. S. 362 (1875, Swayne, J.); *Mellon v. United States ex rel. Hill*, 36 F. (2d) 609 (Ct. App. D. C., 1929); *Jones v. H. D. & J. K. Crosswell, Inc.*, 60 F. (2d) 827 (C. C. A., 4th Circ., 1932). *Broom* (*Legal Maxims*, pp. 663, 607 note) says: "No maxim of the law is of more general or uniform application, and it is never more applicable than in the construction and interpretation of statutes."

The construction of Section 3226 as amended should be made in favor of the petitioner for the further reason that it is a provision relating to taxes. It is a familiar principle that tax statutes should, in case of doubt, be construed favorably to the taxpayer and strictly against the Government. *Gould v. Gould*, 245 U. S. 151 (1917, McReynolds, J.); *United States v. Merriam*, 263 U. S. 179 (1923, Sutherland, J.); *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346 (1927, Butler, J.); *United States v. Updike*, 281 U. S. 489 (1930, Sutherland, J.). It will be noted that in *Bowers v. New York & Albany Lighterage Co.* this court construed a tax statute strictly against a Collector. A construction liberal to this taxpayer will not be illiberal to other taxpayers. See *Burnet v. Guggenheim*, ... U. S. ..., 53 S. Ct. 369 (1933, Cardozo, J.).

Moreover, the provision inserted in Section 3226 R. S. by the 1924 amendment, eliminating necessity for payment under protest or duress, was aimed at an old technical rule which, in view of other changes in the laws affecting the liability of the United States either directly or through the Collectors to refund taxes erroneously or illegally collected, had become a useless appendage, operating only in denial of just claims. This was fully recognized by both Congressional Committees in their reports on the bill which became the Revenue Act of 1924. See House Report No. 179, 68th Congress, First Session, pp. 33-34; Senate Report No. 398, 68th Congress, First Session, p. 44. The Senate report stated:

> "Section 1114. The provisions of Section 1318 of existing law have been amended to provide that *after the enactment of the bill* it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums, or penalties paid, that such amounts *shall have been paid* under protest or duress. The fact protest was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed." (Italics added.)

When the evil sought to be cured by this new provision is considered, it becomes evident that Congress must have intended no limitations on the relief provided except such as it felt necessary, in view of the generality of the provision, to impose in the case of pending suits. "It is an elementary principle of construction that all remedial statutes must be construed with reference to the evils sought to be remedied": *Virginia Coupon Cases*, 25 Fed. 666, 668 (E. D. Va., 1885). See *Beley v.*

Naphtaly, 169 U. S. 353, 360 (1898, Peckham, J.); *Chase v. Erhardt,* 198 Fed. 305, 310 (D. Vt., 1912); *Camunas v. New York & P. R. S. S. Co.,* 260 Fed. 40 (C. C. A., 1st Circ., 1919), at p. 52; *Soper v. Hammond Lumber Co.,* 4 F. (2d) 872 (N. D. Calif., 1915). *Blackstone,* in his *Commentaries on the Laws of England,* (Cooley, 4th ed., Vol. I) at *88, says:

> "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was for which the common law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy."

The construction contended for by the Government, we submit, preserves the mischief and suppresses the remedy.

Moreover, a remedial statute such as this is should be given retrospective application as one means of suppressing the evil. While an application of Section 3226 R. S. to suits brought after its amendment is not strictly retrospective although the suit relates to taxes paid before the amendment (see *Campbell v. Iron-Silver Mining Co.,* 83 Fed. 643 (C. C. A., 8th Circ., 1897), at p. 645), yet if the construction be regarded as retrospective in its operation, it is nevertheless appropriate in the case of a remedial statute, especially one relating to formal procedure. *Sampeyreac v. United States,* 7 Pet. (32 U. S.) *222 at pp. *239-240 (1833, Thompson, J.); *Seaman v. Bowers,* 297 Fed. 371, 375 (C. C. A., 2d. Circ., 1924); *Larkin v. Saffarans,* 15 Fed. 147 (W. D. Tenn., 1883). This consideration was given con-

trolling force by the Circuit Court of Appeals for the Second Circuit in its first opinion in *Winant v. Gardner, supra* (p. 9), the court saying by Circuit Judge L. Hand:

> "This is a matter between the United States and its citizens, and when it promulgates a rule that it will not insist upon duress and protest as a condition to the recovery of money which by hypothesis it ought not to keep, it seems to us that the policy so declared must be taken as immediately effective, even as reaching to actions then pending. Furthermore, the rule [that statutes are intended only prospectively] does not ordinarily apply at all to statutes which merely effect changes in practice and procedure, *Sampeyreac v. United States,* 7 Pet. 222, *Johannessen v. United States,* 225 U. S. 227, 241, *Hollenbach v. Born,* 238 N. Y. 34, and while the line is hard to draw a priori, the matters here in question appear to us to be more nearly of form than of substance." (Matter in brackets added).

The opinion of the Circuit Court of Appeals, though withdrawn upon consideration of subdivision (b) rendering Section 3226 R. S. as amended inapplicable to pending actions, clearly shows how necessary it was for Congress to insert that saving provision. It is broadly stated that remedial statutes apply to pending actions. See *Lewis' Sutherland Statutory Construction* (2nd ed.), Vol. II, p. 1226; *59 Corpus Juris* 1174-1175; *Campbell v. Iron-Silver Mining Co., supra; Miceli v. Morgano,* 36 F. (2d) 507, 509 (W. D. N. Y., 1929).

The reasoning on which the court below bases its intimation that Section 3226 R. S. as amended does not apply to the suit in the case at bar is that a contrary construction would create a personal liability on the

Collector where none existed before, the court remarking that it was, to say the least, not clear that the provision was intended to, or constitutionally could, have the effect contended for by the taxpayer. The cases relied on by the court are *Fullerton-Krueger Lumber Co. v. Northern Pacific Railway Co.*, 266 U. S. 435 (1925, McReynolds, J.), and *Warner v. Walsh*, 27 F. (2d) 952 (D. Conn., 1928, Burrows, D. J.). As we have shown above, the Government confessed error in the *Warner* case. In the *Fullerton Company* case, the carrier whose liability was affected by the statute had a substantial interest which would have been destroyed. This is not true of the Collector here.

The tax here involved is alleged to have been paid to the Collector in consequence of the assessment by the Commissioner of Internal Revenue of a deficiency in tax for the year 1917. It is beyond question that if judgment should go against the Collector in this case the court would certify, to use the words of Section 989 R. S. (U. S. Code, Title 28, Section 842), not only "that there was probable cause for the act done by the collector" but "that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government".(4) Upon such certification by the

(4) We know of no instance of the refusal of a court to grant a certificate of probable cause to a Collector other than United States v. Frerichs, 22 Fed. 637 (S. D. N. Y., 1885). In that case the Collector had seized property pursuant to the request of a revenue agent who was instructed to make the request by the chief clerk of a supervisor. In the suit against the Collector and also in the seizure case the District Court had denied a motion for a certificate that there was reasonable cause for the act. The order in the latter case denying the motion was affirmed by the Circuit Court, and on writ of error this court held that the order was not reviewable. United States v. Abatoir Place, 106 U. S. 160 (1882, Wood, J.). Nevertheless, it was held that the Commissioner was authorized under Section 3220 R. S. to pay the amount of the judgment against the Collector, and that the taxpayer could, in

court, the personal liability of the Collector would cease and the liability would become in technical fact what it was in substance before, an obligation of the United States. *United States v. Emery etc., Co.*, 237 U. S. 28, 31 (1915, Holmes, J.); *Regla Coal Co. v. Bowers*, 37 F. (2d) 373, 377 (S. D. N. Y., 1929, Mack, Circ., J.). It is respectfully submitted that objections based on the purely formal personal liability of the Collector have no place in a case in which it appears that the certificate exonerating him from liability could not lawfully be refused him.

In prescribing the procedural mechanism for the recovery of internal revenue taxes erroneously or illegally assessed or collected, Congress has regularly disregarded the supposed rights of the Collector, while preserving the right of taxpayers to proceed against him for a personal judgment. Instances of this can be multiplied. Suppose the tax is in fact paid under protest and duress: can the Collector protect himself by retaining the money? No. The law requires him to pay it into the Treasury. Section 3210 R. S. (U. S. C. A., Title 26, Section 140).[5] The only thing accomplished by the

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view of the Commissioner's allowance, recover judgment therefor against the United States in the Court of Claims. United States v. Frerichs, 124 U. S. 315 (1888, Blatchford, J.). In the only instance known to us, therefore, of the refusal of a certificate of probable cause, personal liability of the Collector was not enforced and the judgment was nevertheless paid by the United States.

[5] An act of March 3, 1839 (Ch. 82, Sec. 2), requiring moneys collected for duties paid under protest to be remitted to the Treasury, was held to destroy the personal liability of the Collector in a suit to recover duties so paid. Cary v. Curtis, 3 How. (44 U. S.) *236 (1845, Daniel, J.). "Congress, being in session at the time that decision was announced, passed the explanatory Act of February 26, 1845, which, by legislative construction of the Act of 1839, restored to the claimant his right of action against the collector": Arnson v. Murphy, 109 U. S. 238, 340 (1883, Matthews, J.).

protest is to put the *United States* on notice that the taxpayer intends to proceed to get his money back.[6] A formality the performance of which gives the Collector no opportunity to protect himself against personal liability and whose omission in no way affects his obligation with respect to the tax money in dispute can certainly be waived by Congress on behalf of the United States,[7] which has the only interest in the gesture, and cannot harm the Collector.

Again, has the Collector any control over extensions of the period of limitations upon suits against him? By no means. Congress has often extended the time for filing claims for refund or put it within the power of the taxpayer to bring about an extension by filing waivers.[8] The Collector had no hand in the matter. He could not prevent the continuation of his jeopardy, nor could he extend the time. Waivers were not even filed with

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(6) It was formerly important to preserve the formal consequences of suit against a Collector because only in such a suit could interest on the taxes overpaid be recovered. Kinney v. Conant, 166 Fed. 720, 721 (C. C. A., 1st Circ., 1909, Putnam, Circ. J.); cert. den., 214 U. S. 526 (1909). The distinction from the interest standpoint between a suit against the United States and a suit against a Collector has now been obliterated. Section 177, Judicial Code, as amended by Section 615, Revenue Act of 1928 (45 Stat. 791).

(7) The question whether a Collector was bound by a stipulation made in open court was considered by this court solely from the standpoint of the interest of the United States in the litigation, it being undoubted that private litigants are bound by their stipulations. Tucker v. Alexander, 275 U. S. 228 (1927, Stone, J.)

(8) Section 252, Revenue Act of 1918 (40 Stat. 1057), permitted allowance of claims, if filed within five years from the date the return was due, which would otherwise have been barred under Section 3228 R. S., fixing a limitation of two years upon the filing of such claims. Section 252, Revenue Act of 1921 (42 Stat. 227), repeated this provision. This section was amended by the Act of March 4, 1923, to allow the filing of a claim for 1917 within six years after the return was filed, if

him, but were filed with the Commissioner. A claim for refund having been filed within the period prescribed therefor, as extended by act of Congress or by the filing of waivers, the taxpayer had two years after rejection of the claim within which to sue the Collector. Can the Collector bring about a rejection of the claim so as to hasten the running of time in his favor? Can he insist that a claim be allowed if he thinks it meritorious, and thus avoid "personal" liability? The matter is entirely out of his hands.[9] He has nothing to do with claims except to receive them, make a record of them and transmit them to the Commissioner. Moreover, Congress from time to time has extended the period within which

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a waiver was filed within five years from the due date of the return. By the Act of March 13, 1924, Section 252 of the 1921 Act was amended to make the same provision for 1918 taxes. Section 281 (e), Revenue Act of 1924, provided that, if waivers for the years 1917 and 1918 had been filed within five years after the return was filed, claim for refund thereof might be filed either on or before April 1, 1925, or within four years of payment of the tax. Section 284 (g), Revenue Act of 1926, made elaborate provision, in effect extending the time for filing claims for 1917 and 1918, where waivers had been filed, to April 1, 1926; for 1919 taxes to April 1, 1927; and for 1920 and 1921 taxes to April 1, 1928. Subsequent Revenue Acts contain no provisions extending the time for filing claims for refund.

[9] Under Section 3220 R. S. as amended (U. S. C. A., Title 26, Sec. 149), the refunding of taxes is entrusted to the Commissioner of Internal Revenue. Under Section 3226 R. S. the claim for refund must be "duly filed with the Commissioner of Internal Revenue * * * according to * * * the regulations". Reg. 77, Art. 1252, requires the claim to be filed on Form 843 with the Collector, as did Reg. 74, Art. 1252, Reg. 69, Art. 1302, Reg. 65, Art. 1302, Reg. 62, Art. 1031(a). Recent decisions of this court have established that the claim need not be made on Form 843 nor be filed with the Collector. The latter's part in the matter is ministerial. See Ritter v. United States, 28 F. (2d) 265, 267 (C. C. A., 3rd Circ., 1928).

suits might be brought for the recovery of taxes,[10] and has done so in the case of barred claims.[11] Has it occurred to anyone to object that Collectors were injured? Some such objection was apparently made in *Public Service Corporation of New Jersey v. Herold,* 273 Fed. 282 (D. N. J., 1921), in which the Court held that, although Section 14(a) of the Revenue Act of 1916 allowed claims for refund of taxes illegally collected under the 1909 Act to be presented notwithstanding the expiration of the two year limitation provided for such presentation by Section 3228 R. S., no right was created to sue the Collector, but only a right to file a claim with the Commissioner. This judgment was reversed by the Circuit Court of Appeals, 279 Fed. 352 (C. C. A., 3rd Circ., 1922), although the same court had held prior to the enactment of the 1916 Act (229 Fed. 902) that these same plaintiffs could not recover these same taxes, in a suit against the same Collector, because of failure to file timely claims for refund. It will be noted that the Act of 1916 gave only the right to file claims; from this the Circuit Court of Appeals derived the right of the taxpayers to sue the Collector and recover the very taxes which the same

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(10) Rev. Act of 1921, Secs. 1318, 1319; Act of Mar. 4, 1923, c. 276, Sec. 2 (42 Stat. 1505); Rev. Act of 1924, Sec. 1014(a); see Warner v. Walsh, supra, at 24 F. (2d) 451; Rev. Act of 1924, Sec. 1015, Reg. 65, Art. 1352. Section 3227 R. S., enacted June 6, 1872, operated to extend the time for suit, but the Collector was nevertheless held liable. James v. Hicks, 110 U. S. 272 (1882, Matthews, J.).

(11) Rev. Act of 1921, Sec. 1318. An instance in point is the statute involved in Sage v. United States, 250 U. S. 33 (1919, Holmes, J.). Congress had, by the Act of July 27, 1912, 37 Stat. 240, permitted the recovery of taxes paid under the War Revenue Act of June 13, 1898, if claim therefor was presented not later than January 1, 1914. The court presupposed that suit would lie against a Collector as well as against the United States.

court had previously adjudged not recoverable from him.

Congress has shown a similar disregard of the supposed rights of Collectors in its legislation with respect to interest. Formerly, interest was recoverable in a suit against a Collector from the date of payment of the tax (under protest and duress) to the date of judgment. By Section 1117, Rev. Act of 1926, Congress amended Section 177, Judicial Code (U. S. C. A., Title 28, Sec. 284), so as to allow interest at six per cent. in any judgment of any court rendered (whether against the United States or a Collector) for any internal revenue tax overpayment, from the date of the payment thereof to the date of final judgment. This for the first time placed suits against the United States and suits against Collectors on a parity with respect to interest, and for the first time provided specifically for interest in suits against Collectors.[12] By Section 615 (a), Rev. Act of 1928, Section 177, Judicial Code, was amended so as to provide for interest beyond the date of judgment, "to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner". This enlargement of the Collector's interest liability applied in terms to all judgments thereafter rendered. *Skinner v. Eaton,* 45 F. (2d) 568 (C. C. A., 2nd Circ., 1930), cert. den., 283 U. S. 837 (1931); *Mellon v. United States ex rel. Orono Pulp & Paper Co.,* 50 F. (2d) 1007 (Ct. App. D. C., 1931).

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[12] The Collector was not always held liable for interest from the date of payment, notably in cases of delay by the taxpayer. Taylor v. Treat, 153 Fed. 656 (S. D. N. Y., 1907); see Boston & P. R. Corporation v. Gill, 257 Fed. 221 (D. Mass., 1916). In this respect the 1926 amendment of Sec. 177, Jud. Code, enlarged the liability of Collectors with respect to interest.

Congress has enlarged the liability of Collectors in many more situations than those we have instanced, and has made no effort to protect their supposed rights. Had it regarded these rights as more than formal, doubtless it would have protected them. But it did not permit form to stand in the way of the substantial relief granted, and is not to be presumed to have intended otherwise in this case.

Respectfully submitted,

JOHN G. BUCHANAN,
PAUL G. RODEWALD,
Amici Curiae.

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SUPREME COURT OF THE UNITED STATES.

No. 675.—October Term, 1932.

George Moore Ice Cream Company, Inc., Petitioner, *vs.* J. T. Rose, Collector of Internal Revenue for the District of Georgia.	On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

[May 8, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, a corporation, brought suit against the respondent, a Collector of Internal Revenue, to recover income and profits taxes alleged to have been wrongfully collected. A demurrer by the Collector was sustained in the District Court upon two grounds: first, that the payment of the taxes had been made without protest; and second, that the original claim for refund filed with the Commissioner was defective and that amendment came too late. The Circuit Court of Appeals upheld the decision upon the second ground without passing on the first. 61 F. (2d) 605. The case is here on certiorari.

On April 1, 1918, the petitioner filed its return for the year 1917, disclaiming any tax liability. The Commissioner of Internal Revenue, auditing the return, found a tax liability in the sum of $6,871.18, and assessed a tax accordingly. The respondent, after notice of the assessment, made demand upon the taxpayer, giving notice that there would be distraint and sale unless payment was made within ten days. On November 5, 1923, the taxpayer yielded to the demand, moved by the desire to avoid the seizure of its property, but without protest to the Collector that the tax was illegal, either wholly or in part. Four years later, on November 5, 1927, it filed a claim for refund with the Commissioner, and on November 13, 1928, an amended claim, amplifying and making more specific the statements of the first one. The claims were rejected by the Commissioner, though a revenue agent had reported that a refund was due in the sum of $4,551.01. The petitioner alleges that the payment was excessive to that extent and sues the Collector for the moneys overpaid.

1. At common law, and for many years under the federal statutes, protest at the time of payment was a condition precedent to

the recovery of a tax. *Elliott* v. *Swartwout*, 10 Pet. 137, 153; *Curtis's Adm'x* v. *Fiedler*, 2 Black 461; *Chesebrough* v. *United States*, 192 U. S. 253; *United States* v. *N. Y. and Cuba Mail S. S. Co.*, 200 U. S. 488. The rule persisted till 1924, when it was abolished by the Revenue Act of that year, with a proviso that pending suits should be unaffected by the change. Revenue Act of 1924, c. 234, 43 Stat. 253, 343, sec. 1014, amending R. S. § 3226;[1] 26 U. S. C., § 156. This suit was not begun till March, 1931, and is thus outside of the proviso. Even so, the payment to be recovered was made in 1923, when protest was still necessary. The petitioner contends that the new rule applies to all suits begun after the adoption of the amendment. The Government contends that the old rule survives if the payment was before the amendment, though the suit was begun afterwards.

We think the intention of the Congress was to remove the requirement of protest in any suit thereafter brought, irrespective of the date of the underlying payment.[2]

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[1]Section 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

[2]In the lower federal courts the decisions are conflicting. Most of them have taken the view adopted here. Beatty *v.* Heiner, 10 F. (2d) 390; Warner *v.* Walsh, 24 F. (2d) 449; Hyatt Roller Bearing Co. *v.* United States, 42 F. (2d) 1008; Weir *v.* McGrath, 52 F. (2d) 201; Electric Storage Battery Co. *v.* McCaughn, 52 F. (2d) 205; cf. Winant *v.* Gardner, 29 F. (2d) 836; Moses *v.* United States, 61 F. (2d) 791. Contra, Warner *v.* Walsh, 27 F. (2d) 952.

The tokens of intention are within the statute and outside of it. Of the tokens within the statute, the saving clause, (b), is entitled to a leading place. "This section shall not affect any proceeding in court instituted prior to the enactment of this act." The implication is that any proceeding not covered by the exception is to be subject to the rule. *Moses* v. *United States*, 61 F. (2d) 791, 794. Cf. *Brown* v. *Maryland*, 12 Wheat. 419, 438. But there are other tokens, and tokens still within the statute, that point the same way. The phraseology of the section in all its parts imports a regulation of procedure. No suit "shall be maintained" until a claim for refund or credit has been filed with the Commissioner. If such a claim has been filed, suit may be "maintained," though there was neither protest nor duress. Even pending actions would commonly be covered by such words. "To maintain a suit is to uphold, continue on foot, and keep from collapse a suit already begun." *Smallwood* v. *Gallardo*, 275 U. S. 56, 61. If suits already begun are taken out by an exception, to "maintain" can mean no less than to prosecute with effect, without reference to the date of the transaction at the root. *Collector* v. *Hubbard*, 12 Wall. 1, 14. In saying this we speak of the inference to be drawn when the balance is not shifted by countervailing weights. None can be discovered here. There could be no denial by anyone that transactions antedating the statute would be subject to the rule that the suit is not maintainable without the filing of a claim. The inference is cogent that the same transactions are covered when it is said in the same sentence that the suit *may* be maintained without evidence or averment of protest or duress. There is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function. The field of operation is not shifted between the clauses of a sentence.

If we turn to extrinsic tokens of intention, and view the statute in the light of its history and aims, the signposts are the same. The requirement of protest as it stood before the statute was not limited to suits against a collector of internal revenue or other public officer. It extended and was often applied to suits against the Government itself. Even in suits against the Collector, the United States was almost always the genuine defendant, the liability of the nominal defendant being formal rather than substantial. In this situation the Government was unjustly enriched at the expense of the taxpayer when it held on to moneys that

had been illegally collected, whether with protest or without. So at least the lawmakers believed, and gave expression to that belief, not only in the statute, but in Congressional reports. Senate Report, No. 398, 68th Congress, First Session, pp. 44, 45;[3] House Report, No. 179, 68th Congress, First Session, pp. 33, 34. The amendment was designed to right an ancient wrong. It did not draw a distinction between suits against the body politic and suits against a public officer who was to be paid out of the public purse. It put them in a single class, and made them subject to a common rule. A high-minded Government renounced an advantage that was felt to be ignoble, and set up a new standard of equity and conscience. There was no thought to discriminate between payments made and those to come. A fine sense of honor had brought the statute into being. We are to read it in a kindred spirit. *United States* v. *Emery*, 237 U. S. 28, 32.

The argument is made that power was lacking, though intention be assumed. Defect of power is not suggested where the claim for restitution is against the Government itself. The case assumes another aspect, we are told, when the suit is against an officer who is to be personally charged. Until 1924, a Collector was not liable to a taxpayer for a tax illegally collected unless protest gave him notice that he was a party to a wrong. The Government suggests that there is an infraction of the Fifth Amendment, a denial of due process, if liability is cast upon him after the event. There is a subsidiary point that at least the doubt is so great as to canalize construction along the course of safety. *United States* v. *La Franca*, 282 U. S. 568, 574; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, *supra*. But avoidance of a difficulty will not be pressed to

[3]The Senate Report contains the following:

"Section 1114. The provisions of Section 1318 of existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums, or penalties paid, that such amounts shall have been paid under protest or duress. The fact protest was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed."

the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered.

As applied to this respondent in the circumstances of his official action stated in the record, the statute is constitutional though its effect is to broaden liability both for the past and for the future. As the law stood before later statutes, the taxpayer's protest was notice to a Collector that suit was about to follow, and was warning not to pay into the Treasury the moneys collected. *Elliott* v. *Swartwout*, *supra*; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4. Statutes first enacted in 1839 (Act of March 3, 1839, c. 82, § 2, 5 Stat. 348) and progressively broadened (R. S., § 3210; 26 U. S. C., § 140), made it the duty of Collectors to pay the money over to the Government, whether there had been protest or no protest. At first this was thought to have relieved them of personal liability (*Cary* v. *Curtis*, 3 How. 236; *Smietanka* v. *Indiana Steel Co.*, *supra*), but later acts of Congress established a different rule, though maintaining the duty to make remittance to the Treasury. *Philadelphia* v. *Collector*, 5 Wall. 720, 731; *Curtis's Adm'x* v. *Fiedler*, 2 Black 461, 479; *Collector* v. *Hubbard*, *supra*; *Arnson* v. *Memphis*, 109 U. S. 238, 241; 5 Stat. 727; 12 Stat. 434, 725, 729; 12 Stat. 741, sec. 12; 13 Stat. 239; 14 Stat. 329, sec. 8. Along with the duty there went a pledge of indemnity by the Government itself, a pledge not absolute, it is true, but subject to a condition. 12 Stat. 741, sec. 12; *United States* v. *Sherman*, 98 U. S. 565; *Philadelphia* v. *Collector*, *supra*, p. 733; *Smietanka* v. *Indiana Steel Co.*, *supra*. The condition was that a certificate be granted by the court either (a) that there was probable cause for the act done by the Collector or other officer, or (b) that he acted under the directions of the Secretary of the Treasury or other proper officer of the Government. 12 Stat. 741, sec. 12; Act of March 3, 1863. In that event no execution was to issue upon the judgment, but the amount of the recovery was to be paid out of the Treasury. The pledge of indemnity was carried forward into the Revised ~~Stats~~ Statutes with only verbal changes (R. S. 989), and stands upon the books today. 28 U. S. C., sec. 842.[4] The effect of the certificate, when given, is to

[4] § 842. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury,

convert the suit against the Collector into a suit against the Government. *United States* v. *Sherman, supra.*

This Collector did act under the directions of the Secretary of the Treasury, or other proper officer of the Government in the collection of the tax. The complaint shows upon its face that the tax had been duly assessed by the Commissioner of Internal Revenue. In that situation the Collector was under a ministerial duty to proceed to collect it. R. S. sec. 3182; 26 U. S. C., sec. 102; *Erskine* v. *Hohnbach,* 14 Wall. 613. There was nothing left to his discretion. Other duties less definitely prescribed may leave a margin for judgment and for individual initiative. Cf. *Agnew* v. *Haymes,* 141 F. 631. There was no such margin here. His duty being imperative, he is protected by the command of his superior from liability for trespass (*Erskine* v. *Hohnbach, supra; Haffin* v. *Mason,* 15 Wall. 671, 675; *Harding* v. *Woodcock,* 137 U. S. 43, 46), and is entitled as of right to a certificate converting the suit against him into one against the Government. *United States* v. *Sherman, supra.* His position could be no better if there had been protest at the time of payment. He would still have been under a duty to obey the command of his superior and collect the tax assessed. Also he would still have been under a duty to make prompt remittance to the Treasury. There had been confided to him no power to review or to revise. *Erskine* v. *Hohnbach, supra; Harding* v. *Woodcock, supra.* The case is not one for a certificate of probable cause, as it might be if the officer had trespassed under a mistaken sense of duty. In such circumstances a certain latitude of judgment may be accorded to the certifying judge, though even then it is enough that a seizure has been made upon grounds of reasonable suspicion. *Locke* v. *United States,* 7 Cranch 339; *Agnew* v. *Haymes, supra; Carroll* v. *United States,* 267 U. S. 132, 149; *Dumbra* v. *United States,* 268 U. S. 435, 441. One does not speak of probable cause when justification is complete. Here the certifying judge will be subject to a specific duty upon the facts admitted by the demurrer to relieve the Collector of personal liability and to shift the burden to the Treasury.

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in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

This court has often held that a pledge of the public faith and credit will permit the seizure of property by right of eminent domain, though what is due for compensation must be ascertained thereafter. *Sweet* v. *Rechel*, 159 U. S. 380; *Crozier* v. *Krupp*, 224 U. S. 290; *Joslin Co.* v. *Providence*, 262 U. S. 668, 677; *Dohany* v. *Rogers*, 281 U. S. 362, 366; *Hurley* v. *Kincaid*, 285 U. S. 95, 104, 105. The assurance of indemnity is as ample, the reparation prompter and more summary, upon the facts before us here.

A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. *Philadelphia* v. *Collector*, *supra*, p. 731. There may have been utility in such procedural devices in days when the Government was not suable as freely as now. *United States* v. *Emery*, *supra*; *Ex parte Bakelite Corp.*, 279 U. S. 438, 452; Act of February 24, 1855, c. 122, 10 Stat. 612, secs. 1 and 9; Judicial Code, § 145; 28 U. S. C., § 250; Judicial Code, § 24 (20); 28 U. S. C., § 41 (20). They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.

The case comes down to this: In its application to this Collector the amendment of 1924 has left the law the same as it had been for many years. There has been no change to his detriment in the definition of rights and wrongs. His conduct must have been the same though the statute had been on the books from the beginning. There has not even been any change to his detriment in the law of remedies. Execution can never issue against him upon any judgment recovered in favor of the taxpayer. The Government has enlarged the remedy against itself by dispensing with what was once an indispensable formality. As to subordinate officials who have acted in the line of duty it has made the change innocuous by assuming liability. One who is brought before the court as a formal party only will not be heard to object that there has been a denial of due process in enlarging the liability to be

borne by some one else. Enough that the legislation is valid as to him, whether it be valid or invalid in its bearing upon others.

The decision of this case does not require us to determine whether the Act of 1924 would affect the respondent's liability if the certificate of the court converting the suit into one against the Government were dependent upon controverted facts, or upon facts permitting different inferences or calling upon the judge to exercise discretion. No such situation is presented by the record now before us. Indeed, no such situation, it would seem, can ever be presented where a Collector has done no more than accept payment of a tax assessed by a superior who has been invested by the statute with power to command. Our duty does not require us to deal with problems merely hypothetical. If a case should develop where a certificate might issue as a matter of discretion, other questions would be here. There would then be need to consider whether the objection of a denial of due process would be open to a Collector until a request for the certificate had been made and refused. "Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment." *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; *York* v. *Texas*, 137 U. S. 15, 20. There would be need also to consider whether in its application to an officer acting of his own motion, and not in the fulfilment of the command of a superior, the requirement of protest is a procedural limitation upon the remedy for a wrong, or one of the substantive elements of the wrong itself. We leave those questions open.

2. The Government contends that the claim for refund filed by the petitioner with the Commissioner of Internal Revenue was not subject to amendment after the time had gone by when a claim wholly new would have been barred by limitation.

The claim in its original form gave notice of specific errors in the adjustment of invested capital. It gave notice also in general terms that aside from any errors in the adjustment of the capital there had been an erroneous assessment of net income at the sum of $16,940.18, when in fact there had been a loss. We think the statements as to income were subject to amendment. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89.

The judgment is

Reversed.